

# Exhibit 23

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-cgm

4 - - - - - x

5 In the Matter of:

6

7 BERNARD L. MADOFF,

8

9 Debtor.

10 - - - - - x

11 Adv. Case No. 10-03635-cgm

12 - - - - - x

13 Fairfield Sentry Limited (In Liquidation) et al,

14 Plaintiff,

15 v.

16 Union Bancaire Privee, UBP SA et al,

17 Defendants.

18 - - - - - x

19 Adv. Case No. 10-03636-cgm

20 - - - - - x

21 Fairfield Sentry Limited (In Liquidation) et al,

22 Plaintiff,

23 v.

24 Union Bancaire Privee, UBP SA et al,

25 Defendants.

1 - - - - - x

2 Adv. Case No. 10-04285-cgm

3 - - - - - x

4 IRVING H. PICARD, Trustee for the Substantively

5 Consolidated SIPA Liquidation of Bernard L. Madoff

6 Investment Securities LLC and the Chapter 7 Estate of

7 Bernard L. Madoff,

8 Plaintiff,

9 v.

10 UBS AG, UBS (Luxembourg) SA et al,

11 Defendants.

12 - - - - - x

13 Adv. Case No. 10-05345-cgm

14 - - - - - x

15 IRVING H. PICARD, Trustee for the Substantively

16 Consolidated SIPA Liquidation of Bernard L. Madoff

17 Investment Securities LLC and the Chapter 7 Estate of

18 Bernard L. Madoff,

19 Plaintiff,

20 v.

21 Citibank, N.A. et al,

22 Defendants.

23 - - - - - x

24 Adv. Case No. 11-02572-cgm

25 - - - - - x

1 IRVING H. PICARD, Trustee for the Substantively  
2 Consolidated SIPA Liquidation of Bernard L. Madoff  
3 Investment Securities LLC and the Chapter 7 Estate of  
4 Bernard L. Madoff,

5 Plaintiff,

6 v.

7 Korea Exchange Bank, Individually And As Trustee,  
8 Defendants.

9 - - - - - x

10 Adv. Case No. 11-02573-cgm

11 - - - - - x

12 IRVING H. PICARD, Trustee for the Substantively  
13 Consolidated SIPA Liquidation of Bernard L. Madoff  
14 Investment Securities LLC and the Chapter 7 Estate of  
15 Bernard L. Madoff,

16 Plaintiff,

17 v.

18 The Sumitomo Trust and Banking Co., Ltd.,  
19 Defendants.

20 - - - - - x

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23 United States Bankruptcy Court

24 One Bowling Green

25 New York, NY 10004



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September 14, 2022

10:02 AM

B E F O R E :

HON CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

1 Adversary proceeding: 10-03635-cgm Fairfield Sentry Limited  
2 (In Liquidation) et al v. Union Bancaire Privee, UBP SA et  
3 al  
4 Doc# 939 Notice of Hearing to consider the Letter Requesting  
5 a Pre-Motion Discovery Conference Filed by David Elsberg on  
6 behalf of Fairfield Sentry Limited (In Liquidation),  
7 Fairfield Sigma Limited (In Liquidation), Kenneth Krys,  
8 solely in his capacity as Foreign Representative and  
9 Liquidator thereof, Greig Mitchell, solely in his capacity  
10 as Foreign Representative and Liquidator thereof (related  
11 document(s)938) filed by Clerk of Court, United States  
12 Bankruptcy Court, SDNY. with hearing to be held on  
13 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)  
14  
15 Doc. #938 Letter Requesting a Pre-Motion Discovery  
16 Conference Filed by David Elsberg on behalf of Fairfield  
17 Sentry Limited (In Liquidation), Fairfield Sigma Limited (In  
18 Liquidation), Kenneth Krys, solely in his capacity as  
19 Foreign Representative and Liquidator thereof, Greig  
20 Mitchell, solely in his capacity as Foreign Representative  
21 and Liquidator thereof. (Attachments: # 1 Exhibit A - Email  
22 Correspondence (2022.05.06 2022.07.14) # 2 Exhibit B -  
23 Plaintiffs' First Request for Production Of Documents to  
24 Dexia BIL # 3 Exhibit C - Plaintiffs' Rule 30(b)(6) Notice  
25 to Dexia BIL (2022.07.21) # 4 Exhibit D - Email

1 Correspondence (2022.07.21 2022.08.05) # 5 Exhibit E -  
2 Plaintiffs' Amended Rule 30(b)(6) Notice to Dexia BIL  
3 (2022.07.28)) (Elsberg, David)  
4  
5 Doc# 941 Notice of Hearing to consider the Letter Requesting  
6 a Pre-Motion Discovery Conference Filed by Jeff E. Butler on  
7 behalf of Dexia Banque International a Luxembourg (related  
8 document(s) 940) filed by Clerk of Court, United States  
9 Bankruptcy Court, SDNY. with hearing to be held on 9/14/2022  
10 at 10:00 AM at Videoconference (ZoomGov) (CGM)  
11  
12 Doc. #940 Letter Requesting a Pre-Motion Discovery  
13 Conference Filed by Jeff E. Butler on behalf of Dexia Banque  
14 International a Luxembourg. (Attachments: # 1 Exhibit 1,  
15 Email from Nemetz # 2 Exhibit 2, Email from Butler # 3  
16 Exhibit 3, Email from Nemetz # 4 Exhibit 4, Amended  
17 Deposition Notice) (Butler, Jeff)  
18  
19 Adversary proceeding: 10-03636-cgm Fairfield Sentry Limited  
20 ( In Liquidation) et al v. Union Bancaire Privee, UBP SA et  
21 al Doc# 1005 Notice of Hearing to consider the Letter  
22 Requesting a Pre-Motion Discovery Conference Filed by David  
23 Elsberg on behalf of Fairfield Lambda Limited (In  
24 Liquidation), Fairfield Sentry Limited (In Liquidation),  
25 Fairfield Sigma Limited (In Liquidation), Greig Mitchell,

1 solely in his capacity as Foreign Representative and  
2 Liquidator thereof, Kenneth Krys, solely in his capacity as  
3 Foreign Representative and Liquidator thereof. (related  
4 document(s)1004) filed by Clerk of Court, United States  
5 Bankruptcy Court, SDNY. with hearing to be held on  
6 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)  
7  
8 Doc. #1004 Letter Requesting a Pre-Motion Discovery  
9 Conference Filed by David Elsberg on behalf of Fairfield  
10 Lambda Limited (In Liquidation), Fairfield Sentry Limited  
11 (In Liquidation), Fairfield Sigma Limited (In Liquidation),  
12 Greig Mitchell, solely in his capacity as Foreign  
13 Representative and Liquidator thereof, Kenneth Krys, solely  
14 in his capacity as Foreign Representative and Liquidator  
15 thereof. (Attachments: # 1 Exhibit A - Email Correspondence  
16 (2022.05.06 2022.07.14) # 2 Exhibit B - Plaintiffs' First  
17 Request For Production Of Documents to Dexia BIL # 3 Exhibit  
18 C - Plaintiffs' Rule 30(b)(6) Notice to Dexia BIL  
19 (2022.07.21) # 4 Exhibit D - Email Correspondence  
20 (2022.07.21 2022.08.05) # 5 Exhibit E - Plaintiffs' Amended  
21 Rule 30(b)(6) Notice to Dexia BIL (2022.07.28)) (Elsberg,  
22 David)  
23  
24 Doc# 1007 Notice of Hearing to consider the Letter  
25 Requesting a Pre-Motion Discovery Conference Filed by Jeff

1 E. Butler on behalf of Dexia Banque International a  
2 Luxembourg. (related document(s)1006) filed by Clerk of  
3 Court, United States Bankruptcy Court, SDNY. with hearing to  
4 be held on 9/14/2022 at 10:00 AM at Videoconference  
5 (ZoomGov) (CGM)  
6  
7 Doc. #1006 Letter Requesting a Pre-Motion Discovery  
8 Conference Filed by Jeff E. Butler on behalf of Dexia Banque  
9 International a Luxembourg. (Attachments: # 1 Exhibit 1,  
10 Email from Nemetz # 2 Exhibit 2, Email from Butler # 3  
11 Exhibit 3, Email from Nemetz # 4 Exhibit 4, Amended  
12 Deposition Notice) (Butler, Jeff)  
13  
14 Adversary proceeding: 10-04285-cgm Irving H. Picard, Trustee  
15 for the Liquidation of B v. UBS AG, UBS (Luxembourg) SA et  
16 al  
17 Doc# 290 Motion to Dismiss Adversary Proceeding (Dismiss  
18 Second Amended Complaint), filed by Anthony L. Paccione on  
19 behalf of Access International Advisors LLC, Access  
20 International Advisors Ltd., Access Management Luxembourg SA  
21 (f/k/a Access International Advisors Luxembourg) SA) as  
22 represented by its Liquidator Maitre Ferdinand Entringer,  
23 Access Partners SA as represented by its Liquidator Maitre  
24 Ferdinand Entringer, Claudine Magon de la Villehuchet (a/k/a  
25 Claudine de la Villehuchet) in her capacity as Executrix

1 under the Will of Thierry Magon de la Villehuchet (a/k/a  
2 Rene Thierry de la Villehuchet), Claudine Magon de la  
3 Villehuchet (a/k/a Claudine de la Villehuchet) individually  
4 as the sole beneficiary under the Will of Thierry Magon de  
5 la Villehuchet (a/k/a Rene Thierry de la Villehuchet),  
6 Groupement Financier Ltd., Patrick Littaye.

7  
8 Doc# 295 Motion to Dismiss Case filed by Cathy M. Liu on  
9 behalf of Theodore Dumbauld.

10  
11 Doc# 302 Motion to Dismiss Adversary Proceeding / Notice of  
12 UBS Defendants Motion to Dismiss Second Amended Complaint  
13 (related document(s)274) filed by Marshall R. King on behalf  
14 of UBS AG, UBS EUROPE SE (f/k/a UBS (LUXEMBOURG) SA, UBS  
15 Fund Services (Luxembourg) SA, UBS Third Party Management  
16 Company SA. with hearing to be held on 9/14/2022 at 10:00 AM  
17 at Videoconference (ZoomGov) (CGM) Responses due by  
18 6/17/2022

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20 Doc# 271 Notice of Adjournment of Hearing RE: Hearing to  
21 consider the Letter to Chambers Requesting Addition of  
22 Adversary Proceeding to Omnibus Hearing on January 19, 2022  
23 Filed by Brett S. Moore on behalf of Luxalpha SICAV as  
24 represented by its Liquidators Maitre Alain Rukavina and  
25 Paul LaPlume (related document(s)269) filed by Clerk of

1 Court, United States Bankruptcy Court, SDNY; hearing held  
2 and adjourned to 6/15/2022 at 10:00 AM at Videoconference  
3 (ZoomGov) (CGM) .  
4

5 Doc# 307 Opposition /Trustee's Memorandum of Law in  
6 Opposition to Defendants' Motions to Dismiss the Second  
7 Amended Complaint (related document(s)295, 296, 283, 290,  
8 281) filed by Oren Warshavsky on behalf of Irving H. Picard,  
9 Trustee for the Liquidation of Bernard L. Madoff Investment  
10 Securities LLC, and Bernard L. Madoff.

11  
12 Adversary proceeding: 10-05345-cgm Irving H. Picard, Esq.,  
13 Trustee for the Substantive v. Citibank, N.A. et al  
14 Doc# 222 Motion to Dismiss Adversary Proceeding filed by  
15 Carmine Boccuzzi on behalf of Citibank, N.A., Citicorp North  
16 America, Inc., Citigroup Global Markets Limited. with  
17 hearing to be held on 9/7/2022 (check with court for  
18 location) Responses due by 7/1/2022,

19  
20 Doc# 231 Opposition /Trustee's Memorandum of Law in  
21 Opposition to Defendants' Motion to Dismiss (related  
22 document(s)222) filed by David J. Sheehan on behalf of  
23 Irving H. Picard, Esq., Trustee for the Substantively  
24 Consolidated SIPA Liquidation of Bernard L. Madoff  
25 Investment Securities LLC, and the Estate of Bernard L.

1 Madoff.

2

3 Doc# 234 Reply Memorandum of Law in Support of Citi  
4 Defendants' Motion to Dismiss (related document(s)222) filed  
5 by Carmine Boccuzzi on behalf of Citibank, N.A., Citicorp  
6 North America, Inc., Citigroup Global Markets Limited.

7

8 Adversary proceeding: 11-02572-cgm Irving H. Picard, Trustee  
9 for the Liquidation of B v. Korea Exchange Bank,  
10 Individually And As Trustee F

11 Doc# 140 Opposition /Trustee's Memorandum of Law in  
12 Opposition to Defendant Korea Exchange Bank's Motion to  
13 Dismiss the Complaint (related document(s)135) filed by Eric  
14 R Fish on behalf of Irving H. Picard, Trustee for the  
15 Liquidation of Bernard L. Madoff Investment Securities LLC,  
16 and Bernard L. Madoff.

17

18 Doc# 145 Reply to Motion filed by Richard A. Cirillo on  
19 behalf of Korea Exchange Bank, Individually and As Trustee  
20 For Korea Global All Asset Trust I-1, And For Tams Rainbow  
21 Trust III.

22

23 Doc# 144 Amended Motion to Dismiss Adversary Proceeding  
24 filed by Richard A. Cirillo on behalf of Korea Exchange  
25 Bank, Individually and As Trustee For Korea Global All Asset



1 Trust I-1, And For Tams Rainbow Trust III. with hearing to  
2 be held on 9/7/2022 at 10:00 AM at Videoconference (ZoomGov)  
3 (CGM) (Cirillo, Richard)

4

5 Adversary proceeding: 11-02573-cgm Irving H. Picard, Trustee  
6 for the Liquidation of B v. The Sumitomo Trust and Banking  
7 Co., Ltd.

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9 Doc# 119 Stipulation and Order Signed on 5/5/2022 To Amend  
10 Briefing Schedule And Adjourn Argument Date to 9/14/2022 at  
11 10:00 AM at Videoconference (ZoomGov) (CGM)

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15 Transcribed by: Sonya Ledanski Hyde

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1 A P P E A R A N C E S :

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BY: CARMINE BOCCUZZI

1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone. I have a  
3 letter requesting a discovery conference and this is in  
4 Adversary Proceeding 10-03635 and 10-03636. This is  
5 Fairfield Sentry v. Union Bancaire Privee and Fairfield  
6 Sentry v. Adler and Company Private Bank AG. State your  
7 name and affiliation.

8 MR. BUTLER: Good morning, Your Honor. It's Jeff  
9 Butler from Clifford Chance, representing the Defendant --  
10 one of the Defendants in this case, Bank International a  
11 Luxembourg or BIL.

12 THE COURT: Okay, hold on for me a minute. Okay.  
13 So, that's the union bank, is that what it is?

14 MR. BUTLER: No, Your Honor. There are dozens of  
15 defendants in these two cases. We're just one of the many.

16 THE COURT: Okay.

17 MR. BUTLER: And it's called in the caption Dexia  
18 Banque International a Luxembourg, but the name was changed  
19 many years ago to BIL.

20 THE COURT: Hold on just a second. Our recording  
21 has not picked up, so you may have to repeat some  
22 information.

23 MR. BUTLER: Sure.

24 THE COURT: But while they're doing that, tell me  
25 which case number you're on. 03635?

1 MR. BUTLER: 3635 and 3636, Your Honor.

2 THE COURT: Oh, so you're on both?

3 MR. BUTLER: We are Defendants in both of the  
4 cases, correct.

5 THE COURT: Okay. Hold on just a second until we  
6 find out about the sound. We do have backup sound, so it's  
7 not -- backup recordings, just so you know. Hold on, let me  
8 turn a light out. Just a second. Who would've thought two  
9 years ago we'd be light and sound people? Good grief.  
10 Okay, we'll just keep going with what we've got because we  
11 do have backup.

12 So, this is -- and who for Fairfield?

13 MR. ELSBERG: Your Honor, this is David Elsborg  
14 for the liquidators. And I'd like to ask my associate, Amy  
15 Nemetz, to introduce herself. Because with your permission,  
16 my associate Ms. Nemetz will be addressing the Court today.

17 THE COURT: I am delighted to have always young  
18 associates, so welcome. State your name for the record,  
19 please.

20 MS. NEMETZ: Amy Nemetz for the liquidators, Your  
21 Honor.

22 THE COURT: Very good. Now, I have some  
23 questions, but let's go with what you all have to say to me  
24 first.

25 MS. NEMETZ: Certainly, Your Honor.

1 MR. BUTLER: Sure, Your Honor.

2 MS. NEMETZ: Oh. Which letters would you like the  
3 parties to address first? Because there are two.

4 THE COURT: Okay. All right. You tell me.

5 MS. NEMETZ: Jeff, would you mind if I go first?

6 MR. BUTLER: Of course. Please.

7 MS. NEMETZ: Thank you.

8 THE COURT: His name is Mr. Butler on the record.

9 MS. NEMETZ: Yes, Your Honor.

10 THE COURT: Okay.

11 MS. NEMETZ: Your Honor, the liquidators  
12 respectfully request that you compel counsel for Defendant  
13 BIL, which is Banque International a Luxembourg, to explain  
14 why relevant email communications were lost. We only  
15 recently learned that BIL has no electronically stored  
16 communications. The liquidators' document requests, which  
17 were served in September 2021, explicitly asked for these  
18 communications and we had two Rule 26(f) conferences with  
19 BIL's counsel, on October 1st and October 14, 2021. At no  
20 point did BIL's counsel tell us that it did not have  
21 custodial emails.

22 This spring, BIL said that it had substantially  
23 completed its production of documents for jurisdictional  
24 discovery. That production was 74 pages of scanned hardcopy  
25 files. We asked, what about email discovery?

1           After following up on our proposed email search a  
2       number of times, after six weeks, BIL's counsel on the  
3       deadline for substantially completing jurisdictional  
4       discovery told us for the first time that BIL does not have  
5       access to emails. We were surprised, Your Honor. Dozens of  
6       other defendants in these actions, including Luxembourg  
7       entities like BIL, managed to preserve, search for and  
8       product many electronically stored communications.

9           We asked BIL's counsel that same day, June 30th,  
10      what happened to the emails and why weren't they preserved?  
11      BIL's counsel did not respond to us. As you can see in  
12      Exhibits A and D to the liquidators' office 11th letter, we  
13      asked BIL's counsel five separate times in writing on June  
14      30th, July 12th, July 14th, July 28th and August 5th to just  
15      tell us what happened to the emails. Your Honor can also  
16      see from those email chains that BIL's counsel either  
17      ignored or sidestepped our requests. They're simply  
18      refusing to tell us the facts.

19           We also served a Rule 30(b)(6) notice so that we  
20      could ask a BIL witness the same questions about document  
21      preservation that BIL's counsel was refusing to answer.  
22      BIL's counsel didn't serve written objections or responses  
23      to the proposed deposition topics or meet and confer with us  
24      about scheduling or logistics. Instead, BIL is here today  
25      seeking a protective order that would excuse it from having



1 to disclose anything about document preservation.

2 Even after the Court set this hearing, we tried to  
3 communicate with BIL's counsel and resolve this email issue.  
4 On August 24th, we asked BIL's counsel if he had been in  
5 touch with relevant custodians or anyone else at BIL who  
6 might know of any other place where relevant email  
7 communications were saved. He said he didn't know. He  
8 promised he would get back to us a week later. But as of  
9 two weeks after our discussion on September 6th, he said he  
10 still didn't know.

11 Perhaps BIL's counsel is willing and able to  
12 provide this information today but until that happens, the  
13 liquidators are stuck. BIL's repeated stonewalling and  
14 refusal to engage with us on these issues is, in our view,  
15 inconsistent with its obligations under the federal rules of  
16 civil procedure and with the standards of conduct that Your  
17 Honor has explained are expected by parties appearing before  
18 this Court, and the treatment that we are getting is causing  
19 serious prejudice to the liquidators.

20 BIL's failure to preserve electronic  
21 communications in the first place prejudices our ability to  
22 respond to its motion to dismiss. BIL has argued in that  
23 motion that the liquidators failed to allege specific  
24 contacts between it and the United States, but evidence of  
25 those contacts is precisely what we are after. The day-to-

1 day emails, chats, meeting invitations, the paper trail that  
2 should have been left behind showing that BIL directed its  
3 activities to the United States.

4 In the Picard litigation, Your Honor recently held  
5 that alleged email communications between a foreign Sitco  
6 customer Defendant, on the one hand, and BLMIS and FGG and  
7 the United States on the other was a relevant jurisdictional  
8 contact. That decision can be found at Adversary Proceeding  
9 Number 12-1693 Docket 21830 at Page 7.

10 BIL's document production to date, however,  
11 includes zero communications or diary entries of this type,  
12 which the Court has held constitutes critical jurisdictional  
13 evidence. And that is despite the fact, in our view, that  
14 Your Honor has repeated ordered that the liquidators need  
15 discovery on these issues, an order which Judge Preska  
16 recently affirmed in full.

17 Separately, BIL's refusal to disclose the  
18 circumstances under which it lost these emails prejudices  
19 the liquidators' ability to seek relief under Federal Rule  
20 of Civil Procedure 37, which addresses potential spoliation.  
21 Rule 37 is highly fact-specific. It asks whether the  
22 failure to preserve occurred when litigation was reasonably  
23 foreseeable and whether the party took reasonable step under  
24 the circumstances. The relief is also highly fact-specific.  
25 If evidence was destroyed intentionally, then the

1 liquidators might be entitled to an adverse inference. But  
2 even if the evidence was destroyed accidentally, the  
3 liquidators would be entitled to different curative relief  
4 such as, for example, striking certain arguments from BIL's  
5 motion to dismiss.

6 Under similar circumstances, other courts have  
7 ordered disclosure of these facts. A 2016 District of  
8 Connection decision called Bagley v. Yale University at 318  
9 F.R.D. 234 is very instructive. There the court identified  
10 specific factual questions related to litigation holds and  
11 document retention policies, and then compelled the  
12 defendant to provide information about its document  
13 preservation efforts to the plaintiff so that the plaintiff  
14 could evaluate its position and whether relief was necessary  
15 under Rule 37.

16 That is precisely what the liquidators are seeking  
17 Your Honor's assistance with today. The point is we need  
18 the facts about BIL's preservation efforts in order to  
19 navigate this issue. Only BIL has those facts, and BIL is  
20 refusing to disclose that information to us and ultimately  
21 to this Court.

22 Moving on to BIL's responses to our positions, BIL  
23 has raised three main points, and I'll address each one in  
24 turn. First, BIL says that our spoliation concerns are  
25 hypothetical. They are not hypothetical, Your Honor. BIL's

1 employees engaged in email communications during the  
2 relevant timeframe, and BIL's August 12th letter to this  
3 Court says, "It does not have" those emails. That is the  
4 definition of potential spoliation.

5 Moreover, the limited facts that BIL has offered  
6 about its document preservation efforts strongly suggests  
7 that it did not act reasonably under the circumstances. For  
8 example, if you turn to Page 2 of Exhibit A that was  
9 submitted with the liquidators' letter, Mr. Butler's July  
10 12th email says that BIL started preserving evidence in late  
11 2010. Late 2010 was almost two years after the whole world  
12 learned that BLMIS was fraud. There is case law for the  
13 proposition that revelation of a major fraud usually  
14 triggers litigation and puts everyone potentially involved  
15 on notice that they have to preserve relevant evidence, and  
16 some of those cases are cited in Footnote 2 of our August  
17 11th letter.

18 In our view, Your Honor, disclosure of the largest  
19 Ponzi scheme in history, which included Fairfield Sentry as  
20 a feeder fund, and we know that BIL redeemed over \$50  
21 million from Sentry alone, should have raised a very big  
22 flag to BIL to keep everything related to BLMIS, including  
23 emails.

24 Second, BIL argues that it has already produced  
25 all of the relevant emails that existed by giving us its

1     hardcopy transaction file. The 74 pages in that transaction  
2     file contain 25 emails. They appear to be incomplete,  
3     missing pages and attachments, and for obvious reasons, they  
4     don't have metadata associated with them the way that  
5     electronic discovery would. So, we can't see, for example,  
6     whether anyone was blind-copied on the communications.

7             More broadly, BIL cannot back up its assumption  
8     that its employees printed every email that we've asked for  
9     in discovery. BIL's production doesn't have communications  
10    with BLMIS, which the liquidators sought in Request Number  
11    14, or communications about marketing and investment in the  
12    funds, which the liquidators sought in Request Number 6.  
13    BIL's counsel has given us no reason to believe that these  
14    25 printed emails were the only communications ever  
15    exchanged that could be relevant to personal jurisdiction  
16    issues.

17            Third, BIL argues that the information we're  
18    seeking about the preservation of evidence relevant to  
19    personal jurisdiction is somehow outside the scope of  
20    jurisdictional discovery. Taken literally, BIL's argument  
21    means that it could destroy all evidence of contacts with  
22    the United States, file a motion to dismiss for lack of  
23    personal jurisdiction and never have to disclose what  
24    happened to that evidence until the case somehow reaches the  
25    merits. More simply, BIL is just wrong. In our view, Your

1 Honor has been very clear that the liquidators are entitled  
2 to all discovery permissible under the Federal Rules of  
3 Civil Procedure. Rule 37 clearly encompasses the  
4 information that we are asking for about document  
5 preservation efforts. If BIL requires yet another order  
6 authorizing this discovery, however, we see no reason that  
7 the Court cannot enter that today.

8 My final point, Your Honor, is to respond to BIL's  
9 letter seeking a protective order. Today, the liquidators  
10 are not asking this Court to compel a Rule 30(b)(6)  
11 deposition. In our view, if Your Honor orders BIL's counsel  
12 to answer our questions about document preservation, and if  
13 he does so completely, both sides can possibly avoid taking  
14 a 30(b)(6) deposition at all and everyone can avoid  
15 litigating whether or not a protective order should be in  
16 place.

17 For the record, the liquidators don't believe  
18 BIL's request for a protective order has any merit. First,  
19 BIL failed to meet and confer with us about the scope of the  
20 deposition we requested. That violates the face of Rule  
21 26(c) under which it is seeking a protective order, as well  
22 as Local Rule 7007-1 and Your Honor's individual practices.  
23 Second, BIL has made no attempt to show good cause in the  
24 form of undue burden or expense from preparing a single  
25 witness to testify on a limited number of topics. Finally,

1 the sole basis on which BIL seeks this protective order, its  
2 scope argument, is nonsensical for the reasons I've already  
3 explained.

4 In sum, the liquidators are seeking the Court's  
5 intervention so that we all can determine what happened to  
6 BIL's emails and resolve the resulting prejudice to the  
7 liquidators. We just want the facts, Your Honor. We want  
8 the facts about BIL's contacts with the United States so  
9 that we can address personal jurisdiction, and we want the  
10 facts about BIL's failure to preserve emails so that we can  
11 address any potential spoliation issues and, if necessary,  
12 seek additional relief from the Court. At this point, I  
13 would be happy to answer any questions that the Court has.

14 THE COURT: I think you answered my questions  
15 without my asking. Mr. Butler?

16 MR. BUTLER: Good morning, Your Honor. First, a  
17 little bit of background. In this case there's only one  
18 redemption that's at issue with respect to my client. It's  
19 a \$3.9 million redemption that occurred in August of 2007.  
20 It's not \$50 million that's at issue in this case for my  
21 client.

22 THE COURT: I think she said 15, didn't she?

23 MS. NEMETZ: I said 50, Your Honor.

24 THE COURT: Oh, I'm sorry. I apologize. Okay.

25 MR. BUTLER: The practice at my client, which is a

1 bank in Luxembourg, was to keep all documents including  
2 email and correspondence in transaction-specific files and  
3 those files were clearly preserved for this redemption  
4 because we've produced those files as well as the  
5 transaction files for the preceding subscription, which was  
6 \$3.3 million. And as Ms. Nemetz pointed out, there are  
7 about 25 emails in those files, which is about, Your Honor,  
8 what one would expect because this was an execution-only  
9 transaction for BIL. They were merely getting instructions  
10 from a client and executing those instructions. There was  
11 not -- there's no reason to believe there would be a lot of  
12 discussion about that, there's no reason to believe there  
13 would be a lot of email traffic concerning that kind of  
14 transaction.

15 So, as I said, we've produced the transaction  
16 files, we've actually produced a total of about 500 pages of  
17 documents for jurisdictional discovery. In this motion --  
18 and I thought this was the focus on this motion -- the  
19 liquidators are seeking a broad Rule 30(b)(6) deposition  
20 into document preservation efforts back at the time this  
21 case was originally filed in late 2010. Now, that kind of  
22 deposition is relatively normal in merits discovery. And if  
23 this were merits discovery, I wouldn't be here before Your  
24 Honor. But this is jurisdictional discovery that is really  
25 supposed to be focused on contacts between my client and the



1 United States as they relate to the specific subject matter  
2 at issue in this case, which is only one redemption in  
3 August of 2007.

4 So, our position is that, number one, this type of  
5 deposition is just not appropriate for jurisdictional  
6 discovery because it's broadly inquiring into events that  
7 occurred either in 2008, a year after the redemption, or in  
8 2010 when this action --

9 THE COURT: Mr. Butler, she -- I think Ms. Nemetz  
10 was very clear. Right now, she's not asking for that.  
11 She's asking for the email trail in order to be able to, if  
12 necessarily, have that deposition. Am I correct, Ms.  
13 Nemetz, or did I hear that wrong too?

14 MS. NEMETZ: That's partially correct, Your Honor.  
15 We either need the email trail or, if the email trail was  
16 not preserved, we need to understand the circumstances that  
17 led to that.

18 THE COURT: Well, that's -- that might be for  
19 another day.

20 MS. NEMETZ: Yeah.

21 THE COURT: Mr. Butler, go ahead.

22 MR. BUTLER: Well, my response to your question,  
23 Your Honor, would be that we believe we have produced the  
24 email trail that exists. We're not aware of a -- you know -  
25 -

1 THE COURT: Well, you produced hardcopy. Where's  
2 the -- where's the data on those emails? You don't get it -  
3 - you don't get it in hardcopy, Mr. Butler.

4 MR. BUTLER: Electronic -- we don't have --

5 THE COURT: And I know that.

6 MR. BUTLER: Yeah. I'm sorry, Your Honor, I  
7 didn't --

8 THE COURT: Well, then if you don't have it, then  
9 you do need a 30(b)(6). You do need somebody testifying to  
10 where it is and what's going on. If you can't produce it,  
11 then you need somebody testifying to it. You need a  
12 deposition on it.

13 MR. BUTLER: Your Honor, we -- it is definitely  
14 true that we don't have electronic copies of all the emails.  
15 They were only stored in the equivalent of hardcopy form. I  
16 mean, I think I disclosed that information to the  
17 liquidator. They're aware of it. The -- and so, I mean, we  
18 can't produce what we don't have, is my point.

19 THE COURT: Well, you say you can't produce what  
20 you don't have. Then you have to have someone testify to  
21 that, and the lawyer can't do that, is what you're also  
22 saying.

23 MR. BUTLER: I fully agree that the lawyer can't  
24 do that, and I appreciate that comment, Your Honor. I just  
25 -- I don't think that it's appropriate in jurisdictional

1 discovery, which is supposed to be narrow, to go off on a  
2 frolic and detour about a possible spoliation argument when  
3 there's not even a reason to believe that any significant  
4 document is missing because of the nature of this case and  
5 the nature of the transaction at issue. It's a very simple  
6 transaction, Your Honor. You wouldn't expect there to be a  
7 lot of email.

8 THE COURT: Okay, but wait, Mr. Butler. But, Ms.  
9 Nemetz, you said that the emails were not complete. Can you  
10 give us an example?

11 MS. NEMETZ: Yes, Your Honor. There are emails  
12 that BIL has produced in hardcopy where --

13 THE COURT: Well, give us -- give us one example  
14 so we can all understand what you're talking about.

15 MS. NEMETZ: Yes. Let me just bull up the Bates  
16 Number so that I can be as specific as possible.

17 THE COURT: Okay.

18 MS. NEMETZ: So, one example is the document  
19 produced at BIL005 through 007. That's a printed email  
20 chain that shows on its face that it attached scanned  
21 hardcopy files to it. It's not clear from the production  
22 whether those attachments were also produced.

23 THE COURT: Okay. All right, Mr. Butler, that's -  
24 - I -- where are those attachments to those emails?

25 MR. BUTLER: That's an answer I don't have, Your

1 Honor, and I don't think anyone -- that my client has an  
2 answer to that. We're talking about emails that were sent -  
3 -

4 THE COURT: You're talking to someone -- you're  
5 talking to someone that's totally familiar with electronic  
6 data. So --

7 MR. BUTLER: I understand, Your Honor.

8 THE COURT: So, let's be clear about that. I'm  
9 sort of in a rock and a hard place, because when I listened  
10 to Ms. Nemetz it was like, make sure that you have that  
11 information too. And then you're saying that information  
12 doesn't exist. So, then that does instantly equal having a  
13 Rule 30(b)(6) deposition. So --

14 MR. BUTLER: Your Honor, respectfully, I don't  
15 think there's any reason to believe that the kind of broad  
16 email record that Ms. Nemetz is speculating about -- there's  
17 no reason to believe it ever existed.

18 THE COURT: If you've got an attachment to an  
19 email, and that attachment has not been produced, and you've  
20 produced the email without the attachment -- no, that's not  
21 right.

22 MR. BUTLER: Your Honor, that -- it was produced  
23 in that form because that's how it was maintained in the  
24 ordinary course in the files of my client. Now, this  
25 specific email, Your Honor, was not raised with me -- has

1 not been raised with me before as a focus of the  
2 liquidators' concern. I would be happy to go back to my  
3 client and see if there are additional searches that could  
4 be performed to locate those specific attachments.

5 THE COURT: Why didn't you do that before? Why  
6 are we -- when you -- when you had the Rule 26 obligation to  
7 have done that before?

8 MR. BUTLER: Your Honor, in the meet and confer  
9 process where we were discussing the scope of documents that  
10 we would produce, we were I think very clear about the scope  
11 that we were willing to produce. I never had a response  
12 from Ms. Nemetz or anyone on the liquidators side saying, we  
13 really think we need these particular attachments. I don't  
14 even know the content of that email that Ms. Nemetz just  
15 cited to you --

16 THE COURT: Of course you didn't, unless you had  
17 it to begin with. Okay, like I say, I'm sort of in a rock  
18 and a hard place. We have incomplete emails. Ms. Nemetz,  
19 Mr. Butler, meet in person.

20 MR. BUTLER: Oh, happy to do that, Your Honor.

21 MS. NEMETZ: Certainly, Your Honor.

22 THE COURT: Meet in person, have your documents  
23 there. And I'm going to just kick the can down the road  
24 because right now, what I'm going to demand is you meet the  
25 requirements under Rule 26. And that means you get

1 metadata. And I know they've got it. You can't tell me a  
2 bank doesn't have it.

3 That being said, I'll talk about the 36 -- the  
4 30(b)(6) possibility on October 19th. So, you all have got  
5 time to get -- take a look at everything, go over line by  
6 line whatever needs to be done, and then -- that's quick.  
7 So, I'll need to know exactly what I'm ruling on at that  
8 time but it will be the possibility of having the 30(b)(6).

9 Now, Ms. Nemetz, we're talking about jurisdiction  
10 here and Mr. Butler's correct. This is narrow.

11 MS. NEMETZ: Yes, Your Honor.

12 THE COURT: So -- and I'll tell you what I'm  
13 looking for, Mr. Butler, is -- just as she said, those BCCs.  
14 Who did those blind copies go to? Are there any? Are you  
15 dealing with the United States on those blind copies? They  
16 need to really look at their material instead of just simply  
17 saying, we don't have it. That's insufficient for me at  
18 this stage.

19 MS. NEMETZ: Yes, Your Honor. I appreciate your  
20 guidance so far. I just want to say that I'm happy to meet  
21 and confer with Mr. Butler in person as many times as is  
22 necessary to sort this out. But so far, whenever we've  
23 asked these questions -- for example, we asked him several  
24 weeks ago whether he'd spoken to any of the relevant  
25 custodians who sent these emails, and he said no. And we

1 still don't --

2 THE COURT: Mr. Butler, I want the names of people  
3 you spoke to at the bank. I want the names of the people  
4 that you're dealing with to make sure this is done.

5 For instance, if you called me and said, I need  
6 something from the Court, I am going to have to call my IT  
7 specialist. And I'm going to tell you, Mr. Butler, as my  
8 lawyer, that I have to talk to that IT specialist to know  
9 about it.

10 MR. BUTLER: Mm hmm.

11 THE COURT: I want you to have that chain in your  
12 head when you do it.

13 MR. BUTLER: Certainly, Your Honor. I've already  
14 discussed it --

15 THE COURT: I want a chain of custody from this  
16 and I don't -- okay, you talked to the CEO. No, the CEO  
17 doesn't have it. I know the CEO doesn't have it. Who is in  
18 charge of IT? Who is the head of IT? Who is the one  
19 responsible for retaining the documents? You get me a chain  
20 of custody because you yourself cannot testify to that  
21 information. And you know it and I know it.

22 MR. BUTLER: Agreed, Your Honor. And I will say I  
23 haven't chased all that information down to date, although I  
24 had many conversations with my client on this subject -- but  
25 we can do more to get what you're requesting.

1 THE COURT: Your client. Which client? Which  
2 client? Did you talk to the IT guy? Did you talk to --

3 MR. BUTLER: Your Honor, I've spoken primarily to  
4 the Legal Department of BIL.

5 THE COURT: Well, the Legal Department can't  
6 testify to it either, and you know that and I know that.  
7 Who's -- who's responsible for the chain of custody for the  
8 information in that bank?

9 MR. BUTLER: I understand, Your Honor.

10 THE COURT: Come back and see me on October 19th.  
11 You two talk, but you two talk in person. Where are you  
12 all?

13 MR. BUTLER: I believe we're both in New York,  
14 Your Honor.

15 THE COURT: Perfect.

16 MS. NEMETZ: I believe our offices are across the  
17 street from each other, Your Honor.

18 THE COURT: That's even better. Yeah. But have  
19 your list and remember we're concentrating on jurisdiction.  
20 But, Mr. Butler, it's not the legal staff. That legal staff  
21 better be talking to who's in charge of the documents and  
22 telling you so.

23 MR. BUTLER: Yes, Your Honor, I understand, I  
24 understand.

25 THE COURT: Excellent. I'm going to take a quick



1 break. It'll only be about three minutes -- to turn the air  
2 conditioning down.

3 MR. BUTLER: Thank you, Your Honor.

4 MS. NEMETZ: Thank you, Your Honor.

5 THE COURT: Thank you. Okay, we are now into the  
6 contested matter. Let me get this one off my plate. Very  
7 good. I believe the next one we have on the agenda is  
8 basically 10-04285, Trustee for the BLMIS v. UBS AG, UBS  
9 Luxembourg. Who else do we have on this one? Let me find  
10 out. It's all the UBS entities, correct? State your name  
11 and affiliation and make sure I'm correct.

12 MR. KING: Good morning, Your Honor. It's  
13 Marshall King from Gibson Dunn & Crutcher on behalf of the  
14 four UBS Defendants. And I can give you those names if  
15 you'd like them.

16 THE COURT: Just put it on the record, please.

17 MR. KING: Sure. Sure. That's UBS AG, UBS EUROPE  
18 SE, UBS Fund Services (Luxembourg) SA and UBS Third Party  
19 Management Company SA.

20 THE COURT: Excellent, thank you.

21 MR. KING: And there are other Defendants as well,  
22 as Your Honor noted, and I'm sure counsel will put their  
23 appearance on as well.

24 THE COURT: Excellent.

25 MS. USITALO: Good morning, Your Honor. This is

1 Michelle Usitalo of Baker Hostetler for the Trustee, Irving  
2 Picard. I'm also here this morning with my colleagues, Mr.  
3 Warshavsky, as well as Ms. Fernandez and Ms. Stork.

4 MR. PACCIONE: Your Honor, Anthony Paccione from  
5 Katten Muchin Rosenamn, on behalf of the Access Defendants,  
6 who I could read their names into the record if you'd like.

7 THE COURT: Let's do. Let's just make the record  
8 clear.

9 MR. PACCIONE: Sure. So, the Access Defendants  
10 that I'm referring to include Access International Advisory  
11 LLC, Access International Advisors LTD, Access Management  
12 Luxembourg SA, formerly known as Access International  
13 Advisors (Luxembourg) SA, Access Partners SA, Patrick  
14 Littaye, Claudine Magnon de la Villehuchet, whose name is in  
15 the caption and I'm happy to spell it, if necessary.

16 THE COURT: No, I have it down. Thank you.

17 MR. PACCIONE: And Groupement Financier Ltd.

18 MR. KNUTS: Good morning, Your Honor. It's Robert  
19 Knuts for Defendant Theodore Dumbauld.

20 THE COURT: And Mr. (indiscernible) has been  
21 adjourned, correct?

22 MR. KING: That's correct, Your Honor.

23 THE COURT: And then we have Defendants in their  
24 capacity as liquidators. Are they on the record today?

25 MR. KING: I don't believe they've moved to

1 dismiss, Your Honor.

2 THE COURT: I don't believe they have either.

3 Exactly. I was just making sure. Thank you. Very good.

4 It is your (indiscernible) business.

5 MR. KING: Thank you, Your Honor. Again, it's  
6 Marshall King from Gibson Dunn on behalf of the UBS  
7 Defendants. This is a case in which the Trustee is seeking  
8 to recover subsequent transfers that were made initially  
9 through two foreign feeder funds. One called Luxalpha and  
10 one called Groupement Financier.

11 I think as we discuss the issues of jurisdiction  
12 this morning, I think it's important to clarify that the UBS  
13 Defendants who are moving for dismissal on that basis are  
14 not investors in BLMIS and they are not investors in those  
15 foreign feeder funds. They are not alleged to have invested  
16 any of their own money with Madoff, whether directly or  
17 indirectly. Instead, we're talking about service providers  
18 to foreign funds. Those foreign funds contracted with the  
19 service providers under foreign law, under contracts  
20 governed by foreign law, to provide services to those funds  
21 in the foreign countries.

22 The Trustee claims there's jurisdiction here on  
23 the theory that these service providers were providing the  
24 scaffolding for investment activities by others -- by the  
25 funds, not by the Defendants themselves. In essence, the

1 Defendants, who are moving for personal jurisdiction  
2 dismissal, were doing business with entities, that is, the  
3 funds, that were transacting business in the United States  
4 but they were not themselves transacting business in the  
5 United States.

6 There are four UBS Defendants. Our motion for  
7 personal jurisdiction -- for lack of personal jurisdiction  
8 is on behalf of just three of those entities. The one we  
9 have not moved on, I think it's important to just clarify,  
10 is UBS Europe SE. It was formerly known as UBS Luxembourg  
11 SA, and it's frequently referred to in the second amended  
12 complaint here as UBS SA. That entity is alleged to have  
13 acted as the custodian for Luxalpha and to have communicated  
14 regularly with the Madoff entity, with BLMIS, by mail, by  
15 fax, by telephone. It's alleged to have signed contract  
16 with BLMIS on behalf of Luxalpha, to have opened an account  
17 with BLMIS. It effectuated the subscriptions and received  
18 redemptions on behalf of Luxalpha from Madoff.

19 As to the other three UBS Defendants, the ones who  
20 we are moving on behalf of, there are no such allegations  
21 about contacts with the United States. To the contrary,  
22 again, they are foreign entities which performed services  
23 abroad under contracts governed by foreign law and which  
24 received payment for their services abroad. It's important,  
25 I think, and the law requires that we focus on each of the

1 Defendants individually to assess whether they have  
2 purposely availed themselves of the privilege of doing  
3 business in the United States and whether the claims in this  
4 case arise out of or relate to those contacts.

5 If Your Honor would permit me, I have a series of  
6 demonstratives that I hope will be helpful to Your Honor in  
7 sorting through a whole list of acronyms and other names  
8 here. And if I could share my screen, I'd appreciate  
9 sharing some demonstratives this morning.

10 THE COURT: I think the host has to give you that  
11 power, and I'm not the host.

12 MR. KING: Okay.

13 THE COURT: Earlier -- earlier I said, you know,  
14 you'd have to talk to the IT staff.

15 MR. KING: Sure.

16 THE COURT: Well, you've got to talk to the IT  
17 staff. I believe it can be done.

18 MR. KING: Okay. I did share a set of these with  
19 counsel for the Trustee shortly before this morning's  
20 hearing began, Your Honor.

21 THE COURT: Let's -- let me get permission. I  
22 have to get permission to let you take the screen. So, give  
23 us two seconds.

24 MS. USITALO: Your Honor?

25 THE COURT: Yes?

1 MS. USITALO: This is Michelle Usitalo of Baker  
2 Hostetler for the Trustee. I just wanted to emphasize the  
3 shortly before the Trustee -- the shortly before the hearing  
4 part of Mr. King's statement, and just note that the Trustee  
5 had not yet had the opportunity to review any of these  
6 demonstratives.

7 THE COURT: Okay, we'll go -- he's now shared. It  
8 may be called kicking the can down the road again, but we'll  
9 see. Okay, you are now the cohost.

10 MR. KING: Thank you, Your Honor. Let me see if I  
11 can make this work. I know all the associates on my side  
12 are panicked that I'm trying to do this myself.

13 THE COURT: I will tell you that would be exactly  
14 what would happen here. The fact that they even let me  
15 punch a button is called panic.

16 MR. KING: Okay, I think I have done it. Is Your  
17 Honor seeing --

18 THE COURT: Perfectly. I see it.

19 MR. KING: Excellent.

20 THE COURT: Okay, you've got everybody here.

21 USBAG et al., okay.

22 MR. KING: Great. So, first, I wanted to speak  
23 about Defendant UBS AG. UBS AG is a Swiss company  
24 headquartered in Switzerland. It's alleged in the complaint  
25 to have offices and activities in the United States but it's

1 not alleged, nor could it be, to be subject to general  
2 jurisdiction in the United States under the Daimler  
3 decision, and there's no allegation that any of the United  
4 States offices played any role in any way related to  
5 Luxalpha or Groupement Financier.

6 It's alleged to have been a cosponsor and co-  
7 promoter of Luxalpha but the complaint doesn't really  
8 explain what those roles are, and it doesn't allege any  
9 activity -- certainly not any U.S.-directed activity or  
10 conduct by UBS AG. And, in fact, what the complaint alleges  
11 -- and this is in Paragraph 162 -- is that the purpose of  
12 having UBS AG as the cosponsor and co-promoter was to  
13 satisfy certain Luxembourg and European regulatory  
14 requirements. It had nothing to do with anything with the  
15 United States.

16 The only conduct by UBS AG that is alleged in the  
17 complaint is really in connection with what the complaint  
18 says is another Madoff-related investment, that is no --  
19 meaning, not Luxalpha and Not Groupement Financier. When  
20 they tried unsuccessfully -- certain employees in London  
21 tried unsuccessfully to conduct diligence on Madoff and to  
22 have a meeting with him. Apparently, the meeting never  
23 happened and so there was no contact. Certainly no  
24 jurisdictionally relevant contact that relates in any way to  
25 the subsequent transfer claims at issue here.

1           The last and only other potential argument the  
2           Trustee has made about U.S.-directed conduct by UBS AG is  
3           that UBS Luxembourg, which is that company I mentioned that  
4           we are not moving to dismiss on behalf of -- at least not on  
5           jurisdictional grounds -- maintained a bank account at a UBS  
6           branch in the United States, and UBS Luxembourg used that  
7           account to pass dollar-denominated transactions to and from  
8           Madoff on behalf of Luxalpha.

9           It's not alleged that UBS AG initiated any of  
10          those transfers. It's merely a bank at which someone else  
11          used their account to make transfers in and out of that  
12          account. I don't think that could be deemed purposeful  
13          availment by the bank in all of the activities of their -- I  
14          don't think there's any basis for arguing that a bank  
15          purposely avails itself of all the transactional activities  
16          that its customers engage in using bank accounts that are  
17          maintained at that branch.

18          And, importantly, and I'll come back to this later  
19          in my argument -- but the complaint, it's almost impossible  
20          to make a determination as to UBS AG that any contact with  
21          the United States -- any of these contacts relates to the  
22          claim that is being brought here because the claim that is  
23          being brought here is to recover subsequent transfers and  
24          there is no allegation that UBS AG ever received a  
25          subsequent transfer of money that originated at BLMIS. I'll



1       come back to that in a bit when I discuss the failings of  
2       the complaint on 12(b)(6) grounds. But it's relevant also  
3       for jurisdictional purposes because the only way  
4       jurisdiction, specific jurisdiction, could be deemed to  
5       exist is if there is purposeful availment and U.S.-directed  
6       conduct and that conduct relates to the claim at issue. And  
7       we don't even know what the subsequent transfer is so it's  
8       impossible to make that determination here as to UBS AG.

9               One other point about UBS AG that's addressed in  
10       the briefs. The Trustee argues that UBS AG waived its right  
11       to challenge personal jurisdiction because back in 2012,  
12       when the Defendants first moved to dismiss the original  
13       complaint, I believe, in this action, UBS AG did not include  
14       a personal jurisdiction argument at that time. As I  
15       mentioned, that occurred in 2012 at a time before the  
16       Daimler decision, which was decided by the Supreme Court in  
17       '14, and under governing Second Circuit law at that time,  
18       UBS AG was subject to general jurisdiction in the United  
19       States because it had -- even though it is a foreign  
20       company, headquartered overseas, it had branches in the  
21       United States. And under governing Second Circuit law at  
22       the time, that was good enough for general jurisdiction.

23               As Your Honor knows, that has changed given the  
24       Daimler decision which establishes that general jurisdiction  
25       only exists -- or with rare exceptions, only exists in the

1 place of incorporation or the principal place of business.

2 So, today, there is no general jurisdiction of UBS AG. And  
3 the Second Circuit has held in similar circumstances in the  
4 Gucci America case, 768 F.3d, 122 -- and I'll just -- I'll  
5 read the quote. It's directly on point.

6 "A defendant does not waive a personal  
7 jurisdiction argument if the argument that the Court lacked  
8 jurisdiction over the defendant would have been directly  
9 contrary to controlling precedent in this circuit." And  
10 that is certainly true of what occurred at the time of that  
11 very first motion to dismiss in this case. UBS AG would not  
12 have had an argument to dismiss for lack of jurisdiction so  
13 it can't be deemed to have waived that -- where it now does  
14 have that argument and has asserted it at its first  
15 opportunity.

16 Next company to talk about is UBS Fund Services  
17 Limited, referred to in the complaint frequently as UBS FSL,  
18 but I recognize that some of the abbreviations get a bit  
19 confusing so I'll try and use the full name, Your Honor.  
20 UBS Fund Services is a Luxembourg company headquartered in  
21 Luxembourg. It's alleged to have been the administrator for  
22 Luxalpha and Groupement Financier. And by that, the Trustee  
23 claims that the entity was performing day-to-day accounting  
24 functions, keeping the shareholder register, communicating  
25 with investors, preparing financial statements, calculating

1 the net asset value. You know, the day-to-day  
2 administrative services, as is hinted at by the name  
3 administrator, for those funds. But, importantly, all of  
4 those activities occurred in Luxembourg. None are alleged  
5 to have occurred anywhere in the United States.

6 In the Trustee's opposition papers he cites a  
7 single fax and four alleged phone calls with the United  
8 States over a four-year period. I will first say that the  
9 phone call evidence that the Trustee has submitted -- and  
10 that's at Exhibit 49 of the declaration that the Trustee  
11 submitted with his opposition papers -- is probably not even  
12 properly considered by Your Honor. This is a chart, I  
13 guess, that is headlined Log of Apparent Phone Calls between  
14 BLMIS and UBS SA or UBS FSL. It's purported to be  
15 authenticated by a lawyer for the Trustee, for Mr. Picard.  
16 I don't think it's appropriately considered on a motion to  
17 dismiss. It's not alleged in the complaint and I don't  
18 think it is appropriately considered on a motion to dismiss  
19 as -- as evidence of anything, honestly. The lawyer who  
20 purports to authenticate it authenticated it as a log of  
21 apparent phone calls so they can't even assert that there  
22 were. But even assuming that four phone calls were placed,  
23 if you total up the minutes, it's 13 minutes over four years  
24 is alleged. And there's nothing argued or presented that  
25 would connect these phone calls to any of the subsequent

1 transfers in this case, even if you considered these minimal  
2 haphazard contact with the U.S.: One fax and four phone  
3 calls over a four-year period.

4 There is no allegation in this case of any  
5 transfers of funds to or from the United States by Fund  
6 Services Limited, no meetings in the United States are  
7 alleged, no -- the Trustee, in his brief, relies on a case  
8 called Kromer for the assertion of jurisdiction over a  
9 foreign administrator of a foreign investment fund. But in  
10 Kromer, the fund at issue was created, managed and operated  
11 in the United -- from the United States. There were regular  
12 calls and countless mailings by the defendant at issue, by  
13 the administrator, with investors and others in the United  
14 States. And there is just nothing remotely like that  
15 alleged about UBS Fund Services Limited.

16 Third, Your Honor -- sorry -- is Defendant UBS  
17 Third Party Management Company, also al Luxembourg company,  
18 also headquartered in Luxembourg. It is alleged to have  
19 been the portfolio manager for Luxalpha from mid-2006 to  
20 late 2008. But that's it on the allegations about UBS Third  
21 Party Management Company. There's no allegations of any  
22 conduct, zero conduct at all by anyone at Third Party  
23 Management Company, much less any that were directed at the  
24 U.S. There's, again, no transfers of funds by UBS Third  
25 Party Management Company, either to the United States or

1 from the United States, no meetings in the United States, no  
2 communications alleged with the United States. The Trustee,  
3 in fact, alleges that UBS Third Party Management Company sat  
4 passively and didn't do anything. So, on that basis, there  
5 can't be purposeful availment of the privilege of conducting  
6 business in the United States.

7 Briefly, the Trustee does try to make an agency  
8 argument alleging that UBS Luxembourg -- again, that's the  
9 other Defendant that we are not moving on personal  
10 jurisdiction grounds -- arguing that the U.S. contacts of  
11 that entity should be attributed to Third Party Management  
12 Company, allegedly because of an advisory committee that was  
13 supposedly formed by UBS Luxembourg. But nowhere in the  
14 brief or in the complaint are there any allegations about  
15 what that advisory committee did or whether it had any U.S.-  
16 directed contacts, even if it could be attributable to Third  
17 Party Management Company.

18 And, as we point out in our reply brief, the  
19 theory that the Trustee has here seems to be backwards.  
20 They are alleging that UBS Third Party Management Company  
21 was the agent of UBS Luxembourg but yet they're trying to  
22 attribute the conduct of the principal to the agent, and  
23 that is not how agency jurisdiction works. All of the  
24 Trustee's jurisdictional arguments about these three  
25 entities boil down to what I said at the beginning, which is

1 the notion that doing business with an entity that does  
2 business in the United States is a basis for jurisdiction;  
3 not -- not based on the jurisdictional conduct -- conduct  
4 and contacts of the defendants themselves. And we think  
5 that just stretches personal jurisdiction too far and that  
6 the 12(b)(2) motion for lack of personal jurisdiction should  
7 be granted.

8 Moving to the merits, Your Honor, I want to  
9 address just a couple of items. I'm not -- we've moved on  
10 546(e) grounds. Your Honor obviously has addressed that  
11 topic in any number of decisions. But there are some unique  
12 pieces here that have not been decided in any prior  
13 decision, including one important one, and that is the  
14 question of whether the Trustee has adequately pled that the  
15 fund Defendants -- the fund Defendants being Luxalpha and  
16 Groupement Financier -- had actual knowledge that BLMIS was  
17 not trading securities.

18 The Trustee concedes that 546(e) would -- is  
19 otherwise applicable, that all the prerequisites for 546(e)  
20 are met, but argues that he can avoid the safe harbor  
21 because of the so-called actual knowledge exception. So,  
22 let's just focus for a moment on what that requires. The  
23 actual knowledge standard is an extraordinarily high  
24 standard to meet. It's a requirement of a subjective mental  
25 state by the Defendant of "a high level of certainty and an

1 absence of any substantial doubt" that BLMIS was not trading  
2 securities. That comes from Judge Bernstein's Merkin  
3 decision in 2014. It is not enough that the Defendant had a  
4 strong suspicion of fraud; it is not enough -- certainly not  
5 enough that there were red flags that should have put  
6 someone on notice of the fraud. It -- it requires that the  
7 Defendant basically conclude a high level of certainty and  
8 no doubt that BLMIS was not trading securities.

9 If you look at the complaint here, that -- all  
10 that the Trustee really pleads is red flags or suspicions.  
11 These -- you know, these next few slides are just a series  
12 of excerpts from the complaint, from the second amended  
13 complaint here, which illustrates the most that the Trustee  
14 has. You'll see that -- you know, it says things like there  
15 are voices in the industry warning, there are serious  
16 concerns, there is a fraud risk. That's in Paragraph 156.  
17 On multiple occasions -- if you look at Paragraph 144, for  
18 instance -- people are alleged to have identified "red  
19 flags." You'll see serious concerns. You'll see skepticism  
20 up in Paragraph 247. Skepticism. You'll see warning signs,  
21 and you'll see people say that there is an opportunity for  
22 fraud. That's up there in Paragraph 234. You can see in  
23 232 on the right hand side again alleging major red flags.

24 All of -- what's missing from the second amended  
25 complaint is any factual assertion that any of the

1 Defendants subjectively believed with a high level of  
2 certainty and no substantial doubt that Madoff was a Ponzi  
3 scheme. And, to the contrary, what you see in the quotes --  
4 all we've relied on here are quotes from the Trustee and the  
5 complaint -- you'll see things like in Paragraph 155 on the  
6 bottom right hand corner, here's a UBS employee noting that  
7 Madoff is controversial. In this excerpt he notes that  
8 there are some oddities, there are things that are odd or  
9 different from the norm. The employee is unable to identify  
10 counterparties or having trouble identifying counterparties  
11 for Madoff. But what does it say? It says everything is  
12 probably fine. And that obviously is not a high -- high  
13 level of certainty that Madoff was committing fraud. That's  
14 noting some problems but having doubts.

15 Elsewhere in the complaint -- and I think this is  
16 really the Trustee's sort of -- the best and most -- their  
17 best argument that anyone noticed wrongdoing at Madoff  
18 concerns an investigation done by a consultant hired by  
19 Access, a fellow named Cutler, who did some diligence, did  
20 some digging and concluded -- and you see it in Paragraph  
21 235 -- the strategy doesn't make sense. And what does he  
22 say? He says, it's possible that these are extremely sloppy  
23 errors or serious omissions in tickets. That's the best  
24 case. Arithmetic errors in the founder's strategy  
25 description. So, even in the coup de grâce of the Trustee's



1 argument, this Cutler investigation, he does not conclude  
2 with a high level of certainty and a lack of doubt that  
3 Madoff was not selling securities and was committing fraud.

4 I would say as you look at all of these and  
5 consider them holistically, the allegations here don't even  
6 approach the kind of allegations that the Trustee made in  
7 the Merkin case that Judge Bernstein decided, where he held  
8 that the Trustee had not -- had failed to plead actual  
9 knowledge. He held they satisfied -- I believe he held they  
10 satisfied the willful blindness test but that isn't enough.  
11 He held they had failed to plead actual knowledge. The  
12 complaint there included the same kind of allegations about  
13 the impossibilities of Madoff's returns and concerns about  
14 fraud, but the allegations there went even further. There  
15 were people who were saying that there was some probability  
16 that Madoff was a fraud and might be a Ponzi scheme. They  
17 had quotes to that effect from the defendants there. And  
18 even with those allegations, Judge Bernstein held that they  
19 constituted, at most, a strong suspicion of fraud but not  
20 the absence of doubt that's required for actual knowledge.

21 And so because the Trustee acknowledges the  
22 applicability of Section 546(e) but has failed to plead  
23 actual knowledge, that means that all of the transfers,  
24 initial and subsequent, prior to two years before the filing  
25 date are protected by the safe harbor and cannot be

1 recovered.

2 Lastly, Your Honor -- last topic I want to mention  
3 is insufficient allegations about -- about the existence of  
4 subsequence transfers. The Trustee needs to plead -- this  
5 is not a question that -- of simply difficulties the Trustee  
6 will have in tracing the funds from Madoff through the  
7 initial transferees to the subsequent transferees. It is  
8 true he will have that problem when we come to it but there  
9 are some glaring items that are simply impossibilities --  
10 not difficulties -- impossibilities on the face of the  
11 complaint that require dismissal of some of the transfers.

12 So, first -- I mentioned this at the beginning --  
13 there is no allegation that UBS AG received any subsequent  
14 transfer at all. In his opposition papers, the Trustee  
15 concedes that he must allege the pathways of the transfers,  
16 how they got from Madoff to the Defendant, and the who, when  
17 and how much of the transfers are at issue. And the Trustee  
18 tries to do this in Paragraph 3 -- Paragraphs 3 -- sorry --  
19 333 through 337 of the second amended complaint.

20 And if you look at those paragraphs, you will see  
21 that the Trustee includes a paragraph about each of the  
22 Defendants in this case, except UBS AG. He articulates the  
23 amounts he's seeking to recover and the pathways, or  
24 attempts to allege them, as to every Defendant, but there is  
25 no allegation in those paragraphs or anywhere else in the

1 complaint about transfers to UBS AG. And I would submit,  
2 Your Honor, that this is not simply an oversight on the  
3 Trustee's part. I think it was a deliberate decision. But,  
4 of course, there are consequences to deliberate decisions.

5 And for that, Your Honor, I would point you to the  
6 following: Back in 2015, the Trustee moved for leave to  
7 amend his complaint in this action, tendering a proposed  
8 second amended complaint at that time. And that is -- I'm  
9 showing Your Honor -- on the left hand side of this screen.  
10 It's Docket Entry 210 in this case. And you'll see there,  
11 the Trustee included a paragraph that said, based on the  
12 Trustee's investigation to date, the UBS Defendants received  
13 at least 97 million in subsequent transfers, including but  
14 not limited to the following. And it lists A, B, C and D.  
15 UBS SA received this amount, UBS FSL received this amount,  
16 UBS Third Party Management Company received this amount.  
17 And here are the rough dates of those receipts. And it  
18 included a Paragraph D, UBS AG received at least 4.2 million  
19 in recoverable subsequent transfers in the form of dividends  
20 paid by UBS SA and UBS FSL, which were comprised in part of  
21 fee amounts received from Luxalpha and Groupement Financier.

22 And so leaving aside for a moment the difficulties  
23 and implausibility of ever proving tracing in that  
24 circumstance, let's look at what the Trustee now alleges in  
25 the operative complaint in this case. And the corresponding

1 paragraph is Paragraph 333, which I mentioned a few moments  
2 ago, and that's on the right hand side here. And what we've  
3 done is run a red line of the currently operative complaint  
4 against the proposed amended complaint that the Trustee  
5 tendered a few years ago -- and you'll see most notably  
6 Paragraph D is no longer in there, and there is nothing else  
7 alleged anywhere in the second amended complaint that  
8 replaces it.

9 So, as such, the Trustee has failed to plead even  
10 the most basic requirements for a claim to recover  
11 subsequent transfers under Section 550 and, at a minimum,  
12 the claim against UBS AG needs to be dismissed, if not for  
13 personal jurisdiction, then for failure to state a claim.

14 And the last point, Your Honor, again, based  
15 solely on the allegations of the Trustee's complaint, a  
16 significant portion of the subsequent transfers he seeks to  
17 recover could not have originated with BLMIS. So, you'll  
18 note here that the Trustee alleges in 33(a) that UBS SA --  
19 again, that's the acronym that's used for UBS Europe SE, now  
20 known as UBS Europe SE -- received at least 32.8 million in  
21 fees for serving as the official custodian and official  
22 manager of Luxalpha from February 2004 to August 2006.

23 Okay, fine. That's an effort to plead the  
24 subsequent transfers as to UBS Europe. But if you total up  
25 all of the initial transfers that existed on or before

1 August 2006 -- and this is pulled from Exhibit B of the  
2 second amended complaint, Your Honor, where the Trustee  
3 lists all of the transfers to and from Luxalpha and Groupe -  
4 - well, Luxalpha in this instance -- purports to list all of  
5 the initial transfers. And if you total up all of the  
6 initial transfers, you get -- as of the end of 2006 -- 16.2  
7 million in initial transfers. That means that it is  
8 impossible that the 32 million that the Trustee seeks to  
9 recover in subsequent transfers for that period could  
10 possibly have been BLMIS customer property and initial  
11 transfers.

12 Again, the Trustee, down the road in this case, if  
13 it survives the deficiencies we've brought to your  
14 attention, is going to have a bear of a time tying initial  
15 transfers to subsequent transfers. But I'm not making that  
16 argument here today. That, I grant you, can be for another  
17 time. What we're focused on in this portion of the argument  
18 anyway is impossibilities, mathematical, physical  
19 impossibilities that 32 million in funds could have been  
20 subsequent transfers when only 16 million were initial  
21 transfers.

22 So, at least to the extent of that -- of the  
23 difference there, some \$16 million, the complaint should be  
24 dismissed, again, if not for all the other reasons we've set  
25 forth in our papers. And I will, for all the other

1 arguments, rely on our papers, Your Honor, and I will -- I'm  
2 happy to answer any questions or to allow the other  
3 Defendants to address their issues.

4 THE COURT: Not yet. I'm -- I'm also considering  
5 -- if you'll let go as cohost so we can get back?

6 MR. KING: Oh, sure. Well -- yeah.

7 THE COURT: Yeah. I don't know how. Maybe she  
8 takes it away from you. I don't know what happens.

9 MR. KING: Maybe so. But I don't need to share  
10 anymore, that's for sure.

11 THE COURT: Ms. Usitalo, I want you to address the  
12 UBS argument and then we'll go to the other arguments. So -  
13 -

14 MS. USITALO: Understood, Your Honor. Let me just  
15 ask -- our plan here today had been for me to address the  
16 issues on the 12(b)(6) points that are brought by all of the  
17 Defendants. And then my colleague, Ms. Stork, was going to  
18 address UBS's jurisdiction arguments. Would you --

19 THE COURT: I want to address those jurisdiction  
20 arguments right now because I, honestly, sort of lumped them  
21 altogether. And one of my questions was going to be explain  
22 the corporate structure of UBS and how it fits in with  
23 Access as you understand it. And so, this argument sort of  
24 bifurcates the argument. So, is Ms. Fernandez going to  
25 address this?

1 MS. USITALO: My colleague, Ms. Stork, is going to  
2 address the UBS jurisdictional issues.

3 THE COURT: Oh, I'm sorry. Ms. Stork.

4 MS. USITALO: So, I will turn it over to her.

5 THE COURT: Yes, Ms. Stork.

6 MS. STORK: Good morning, Your Honor. Okay, I  
7 think I fixed the audio. My apologies there. Good morning,  
8 Your Honor. I'm Victoria Stork, I'm an associate at Baker  
9 Hostetler, counsel for the Trustee, Irving Picard. I'm here  
10 today to argue in opposition to the UBS Defendant's motion  
11 to dismiss on personal jurisdiction. As you are aware, the  
12 Defendants have moved to dismiss, arguing a lack of personal  
13 jurisdiction against the entities -- the three entities, UBS  
14 AG, UBS Fund Services Luxembourg, which is often also  
15 referred to as UBS FSL, and UBS Third Party Management,  
16 often referred to in the papers as UBS TPM. And, together,  
17 I often refer to them as the UBS personal jurisdiction  
18 Defendants.

19 Your Honor, I think it's important to discuss,  
20 particularly after Mr. King's argument, that the standard on  
21 a motion to dismiss looks at the Trustee's well-pleaded,  
22 non-conclusory allegations and exhibits that are taken as  
23 true, and all inferences are to be made in the Trustee's  
24 favor. And, Your Honor, as the Defendants have displayed in  
25 Mr. King's demonstrate, they attempt to tease out each

1 individual contact that's alleged by the Trustee in attempts  
2 to rebut them on a one-by-one basis. This is not  
3 appropriate on a motion to dismiss standard.

4 The second amended complaint includes clear  
5 allegations with demonstrate that the claims the Trustee  
6 seeks to recover arise out of the UBS personal jurisdiction  
7 Defendants' activities. And the Trustee has asserted in the  
8 second amended complaint and highlighted in his papers how  
9 each of these Defendants engaged in business that's  
10 purposefully directed towards the United States and are  
11 subject to the jurisdiction of this Court. And all of these  
12 allegations are to be looked at in the totality of the  
13 circumstances. So, Mr. King's attempt to rebut each one of  
14 them is incorrect at this point in time.

15 The -- and as I will identify by going through  
16 each of the three entities, the Trustee has in a totality  
17 asserted that each of these Defendants does -- he does  
18 establish a prima face case of personal jurisdiction for  
19 each of them.

20 It's also important to identify that the UBS  
21 Defendants -- UBS AG, UBS Fund Services Luxembourg and UBS  
22 Third Party Management -- while we aren't aware of any  
23 individual investments that they made directly into BLMIS or  
24 Luxalpha, they were service providers for Luxalpha and  
25 Groupement. And as service providers they were maintaining



1 and carrying out activities on behalf of Luxalpha and  
2 Groupement. To make the argument that these entities were  
3 not directing anything to New York I think is incorrect.  
4 Each entity was an integral part of Luxalpha and Groupement.  
5 Luxalpha and Groupement could not make investments into or  
6 redemptions from BLMIS on its own. It needed the UBS  
7 Defendants in order to do this. Without the UBS Defendants,  
8 there would have been no investments, there would have been  
9 no redemptions. Luxalpha and Groupement would not have been  
10 able to operate. So, to say that they were just passively  
11 carrying out functions internationally is incorrect.

12 Further, the argument that these entities were  
13 international entities carrying out international contracts  
14 with no contacts to New York is incorrect. It does not  
15 matter that these entities were not based in the state of  
16 New York; what matters is that they were directing  
17 activities to the forum. The actions that they carried out  
18 outside of the United States were directed into the forum,  
19 and the impact and the injury to which the Trustee seeks to  
20 recover funds occurred in New York. The entities were not  
21 purely administrative and, Your Honor, it is completely  
22 reasonable the Defendants should be held into court  
23 regarding their conscious role of directing, developing and  
24 sending investments into BLMIS.

25 I'm going to go through each entity and go through

1 the allegations that the Trustee has pled to determine -- to  
2 show that we have shown in a totality of allegations that  
3 there should be personal jurisdiction over each. I'll start  
4 with UBS Fund Services Luxembourg. UBS Fund Services  
5 Luxembourg acted as the administrator for both Luxalpha and  
6 Groupement and was the management company and portfolio  
7 manager for Luxalpha. Additionally, UBS Fund Services  
8 Luxembourg did serve as the registrar and transfer agent, as  
9 we see in some of the Luxalpha documents.

10 They were responsible for keeping Luxalpha and  
11 Groupement's accounting -- account records, reports,  
12 financial statements and coordination with auditors, but  
13 were also responsible for doing things like keeping register  
14 of the shareholders, handling all subscriptions and  
15 redemptions -- those subscriptions and redemptions which  
16 were going to New York at BLMIS or coming from BLMIS in New  
17 York.

18 UBS Fund Services Luxembourg did work with Access  
19 on Luxalpha and Groupement's management supervision and  
20 administration. And actually in Luxalpha's answer, which it  
21 has recently filed and this Court can take judicial notice,  
22 Luxalpha admitted that -- and I'll quote; it's from  
23 Paragraph 68 of Luxalpha's answer -- that "UBS Fund Services  
24 Luxembourg worked closely with several of the Access  
25 Defendants in the management, supervision and administration

1 of Luxalpha." Further, they admitted that UBS Fund Services  
2 Luxembourg was responsible for calculating Luxalpha's net  
3 asset value based solely on the data that was provided by  
4 BLMIS with no independent verification. This is data that  
5 was coming directly from BLMIS that UBS Fund Services  
6 Luxembourg was retrieving in order to carry out the  
7 functions that they were required to carry out as the  
8 administrator of Luxalpha.

9 UBS Fund Services Luxembourg employees attended  
10 administrative meetings with Access to discover Luxalpha and  
11 Groupement. They participated in calls and email exchanges  
12 with Access employees. Mr. King did discuss the fax  
13 communication and the telephone calls between BLMIS and UBS  
14 Fund Services Luxembourg. The documents which the Trustee  
15 asserted -- which the Trustee can properly assert on the  
16 motion to dismiss based on personal jurisdiction are from  
17 the BLMIS records. And as the Trustee has identified in his  
18 papers, the Trustee does not have all of the records of  
19 Luxalpha, or Groupement, or the UBS Defendants. So, these  
20 are contacts that we are aware of that occurred and together  
21 come to create the totality of the circumstances. And here  
22 what we're seeing is that there numerous contacts where  
23 someone at UBS Fund Services Luxembourg was reaching out to  
24 someone at BLMIS directly, which is in New York. So, they  
25 were directing contact directly into New York.

1 Mr. King also discusses the fact that there's no  
2 transfers or funds to or from the United States alleged.  
3 The Trustee alleges that the UBS Defendants received  
4 transfers from Luxalpha or Groupement in return for fees for  
5 the services that they were providing. So, there were  
6 transfers that came through to the UBS Defendants that were  
7 originated from BLMIS.

8 All of the UBS Fund Services Luxembourg's actions  
9 with respect to Luxalpha and Groupement show that the UBS  
10 Fund Services Luxembourg's communicating, carrying out day-  
11 to-day tasks in operation of the funds, and carrying out  
12 tasks in furtherance of funneling investments through  
13 Luxalpha and Groupement make a prima face case that UBS Fund  
14 Services Luxembourg purposely availed itself of the New York  
15 forum, and the totality of its contacts permit this Court to  
16 exercise personal jurisdiction over it. Further, it's  
17 completely reasonable that Fund Services Luxembourg would be  
18 (indiscernible) to the Court when they were directing things  
19 in and out of New York.

20 Secondly, UBS Third Party Management. Third Party  
21 Management served as Luxalpha's management company from fall  
22 of 2006 through to the exposure of the fraud in November of  
23 2008. They deliberately engaged in investment activity with  
24 BLMIS in New York and they earned substantial fees in  
25 connection with those activities. Additionally -- and I can

1 touch on this later when I talk about UBS AG -- there  
2 weren't numerous UBS AG employees that were members of the  
3 board of UBS Third Party Management. Third Party Management  
4 was officially responsible for all of Luxalpha's investment  
5 management decisions and, as we are aware, Luxalpha only  
6 invested in BLMIS. So, all of those investment decisions  
7 were into and out of New York in BLMIS. They received  
8 management and performance fees tied to Luxalpha's  
9 performance. And, like I just said, that performance was  
10 all directed to and from New York at BLMIS.

11 From the inception of Luxalpha until fall of 2006,  
12 UBS Luxembourg SA, which, as Mr. King stated, is now known  
13 as UBS Europe SE, was Luxalpha's manager. And a management  
14 company services agreement dated on September 22, 2006  
15 transferred that responsibility of Luxalpha's manager to UBS  
16 Third Party Management. On the same day, there was an  
17 agreement for a constitution of an advisory committee, which  
18 was signed and dated between UBS Third Party Management and  
19 UBS Luxembourg SA.

20 Despite the switch in managers, UBS Luxembourg SA  
21 was still participating alongside UBS Third Party Management  
22 through this advisory agreement. Essentially, management by  
23 UBS Third Party Management was directed and assisted by UBS  
24 Luxembourg SA. All management decisions were directed --  
25 were dictated by this advisory committee, and the advisory

1 committee was formed and staffed with UBS Luxembourg SA  
2 directors and Access principals.

3 Again, the Trustee's not privy to most of the  
4 books, and records, and documents of the Defendants at this  
5 time. However, the Trustee is aware that there was an  
6 agreement between UBS Third Party Management and UBS  
7 Luxembourg SA, which created the advisory committee; that  
8 the advisory committee was tasked with making  
9 recommendations in relation to the management and investment  
10 policy and strategy of the Luxalpha fund, and the advisory  
11 committee was staffed fully with UBS Luxembourg SA  
12 employees.

13 The fact that Third Party Management was to carry  
14 out its management duties under the advisement of an  
15 advisory committee signals that Third Party Management and  
16 UBS Luxembourg SA were working in concert. And the Trustee  
17 argues that the jurisdictional contacts where UBS Luxembourg  
18 SA is actively engaging with BLMIS and New York should be  
19 considered for UBS Third Party Management as well.

20 Finally, I will discuss the contacts of UBS AG.  
21 UBS AG served as Luxalpha's sponsor and promoter, and that  
22 is a more integral role than Mr. King was letting on. This  
23 isn't a case where UBS AG was simply behind the scenes  
24 shuffling papers, signing documents. They actually stepped  
25 in as a successor to BMP after BMP closed the Auriga Fund

1 and did not want to be participating in the Luxalpha Fund.

2 UBS was aware from day one that the role of  
3 sponsor and promoter for Luxalpha included things like  
4 seeking out and funneling investments into BLMIS, and that  
5 as it use its funds, the requirement of a sponsor and  
6 promoter plays an important role of the creation, structure,  
7 launch and management in the administration of the fund,  
8 which the Trustee does allege in his second amended  
9 complaint, Paragraph 166.

10 Under the applicable law and uses regulations, the  
11 role of sponsor includes playing a role in the complete  
12 oversight of the fund. And, in practice, it's typically the  
13 main shareholder of the management company or group entity  
14 to which the main shareholder belongs. And as I've  
15 previously stated, UBS AG is -- did have multiple employees  
16 that were on the board of directors of UBS Third Party  
17 Management, which was the management company of Luxalpha.

18 Additionally, UBS AG was responsible for viewing  
19 and approving options counterparties, as the Trustee alleged  
20 in Paragraph 265 of his second amended complaint, and every  
21 redemption from BLMIS came to UBS AG's Stanford branch to an  
22 account for UBS Luxembourg SA. As I previously -- all of  
23 these things together on a totality of the circumstances  
24 show that UBS AG was active and purposely directing  
25 activities towards New York.

1           Finally, one of the arguments that Mr. King and  
2           the UBS Defendants make is that there's limitless  
3           jurisdiction if we're hailing the UBS entities into court.  
4           This is not what the Trustee is seeking. We're not seeking  
5           to cast a limitless dragnet against all entities. We're not  
6           seeking to bring in the custodians or the individuals who  
7           are maintaining copiers at the UBS offices abroad. The  
8           Trustee is simply seeking to hold accountable the entities  
9           that were vital to the harm that occurred here in New York.  
10          They're not random. They were essentially parties who  
11          played vital roles. Each of these entities were key players  
12          who set up and serviced the defendant funds, Luxembourg and  
13          Groupement, and they are entities who we have claims against  
14          for taking fees from the defendant funds in exchange for the  
15          work that they carried out, which were directed straight  
16          into New York with the intention of investing with BLMIS.

17                 In conclusion, Your Honor, we submit that the  
18          Court does have personal jurisdiction over the UBS  
19          Defendants, UBS AG, UBS Fund Services Luxembourg and UBS  
20          Third Party Management, as alleged in the Trustee's second  
21          amended complaint and highlighted in his opposition with the  
22          company (indiscernible). And at the very least, Your Honor,  
23          the Trustee should be entitled to jurisdictional discovery.  
24          Any questions I can answer for you, Your Honor?

25                 THE COURT: Give me a moment to absorb what you



1 said. Just let me think a second.

2 MS. STORK: Absolutely.

3 THE COURT: I'm trying to figure out what you're  
4 saying about what monies did they get. Was this solely fees  
5 for investment advising and custodial services? Is that  
6 what you -- or was it more?

7 MS. STORK: My apologies, Your Honor. Just give  
8 me one quick second to think about this and get a good  
9 answer for you.

10 THE COURT: Sure.

11 MS. STORK: My colleague, Ms. Usitalo will talk  
12 more about that tracing, but what I can tell you is that the  
13 allegations that we have are related to the information that  
14 the Trustee has from contracts and documents where we're  
15 seeing that there are monies that were being transferred for  
16 the services that each of these entities were providing.

17 THE COURT: And so that's what you're saying  
18 jurisdiction is based on?

19 MS. STORK: That's what our claims are based on,  
20 yes.

21 THE COURT: The Court will take a ten-minute  
22 break.

23 MS. STORK: Thank you, Your Honor.

24 THE COURT: Or 15. Let's make it a 15-minute  
25 break. Chambers.

1 (Recess)

2 MR. KING: Your Honor, you're on mute if you're  
3 talking to us.

4 THE COURT: Okay. All right. I think I need the  
5 -- I need a question answered, Ms. Stork, and that is when,  
6 what, where of the money to UBS?

7 MS. STORK: Yes, Your Honor, one second. Let me  
8 just pull that information up right now.

9 THE COURT: Am I off mute?

10 MS. STORK: Yes, Your Honor.

11 THE COURT: And that's UBS AG that I'm asking...

12 MS. USITALO: Your Honor --

13 THE COURT: Yes, ma'am, you're good. I hear you.  
14 State your name, though, for the record.

15 MS. USITALO: Yes. Michelle Usitalo, Baker  
16 Hostetler for the Trustee.

17 THE COURT: Okay, okay.

18 MS. USITALO: And, Your Honor's question -- you  
19 were clarifying that it goes to UBS AG?

20 THE COURT: Right. I'm not clarifying. I need  
21 you to clarify.

22 MS. USITALO: I'm sorry. No, I was clarifying the  
23 question. I'm sorry.

24 THE COURT: Okay.

25 MS. USITALO: Your Honor -- and I can clarify it

1 for you. Because the Trustee does allege that UBS AG  
2 received subsequent transfers as a service provider, and  
3 that's in Paragraph 332 of the complaint where it says that  
4 -- I am pulling it up --

5 THE COURT: Well, I have it right here, but okay.

6 MS. USITALO: Based on the Trustee's investigation  
7 to date, the feeder fund Defendants subsequently transferred  
8 some of the initial transfers to the Access Defendants and  
9 the UBS Defendants, and UBS AG is included in that  
10 definition, as payment for their alleged service of the  
11 feeder funds. And, as Ms. Stork noted previously, Luxalpha  
12 has filed an answer in this complaint and Luxalpha in that  
13 answer has -- has admitted that -- that the UBS Defendants  
14 received payment of fees for their alleged services, and  
15 that includes UBS AG.

16 The Trustee has also alleged, as Ms. Stork noted,  
17 that UBS AG is a sponsor and promoter and as a result,  
18 received fees. And the Trustee has also alleged that --  
19 that UBS AG is the parent company here. And the importance  
20 of that allegation and that relationship is that UBS AG  
21 would've received dividends from UBS SA. In the amount --  
22 we don't have that yet because we don't have the books and  
23 records of Luxalpha, of Groupement, or of the UBS entities.  
24 So, that is -- that is where the Trustee has made the  
25 allegations of UBS AG in his complaint, and we believe that

1 these are allegations that are sufficient to put UBS AG on  
2 notice of the Trustee's claim.

3 THE COURT: Very good. Very good. Anything else,  
4 Ms. Stork or Ms. Usitalo?

5 MS. USITALO: Usitalo.

6 THE COURT: Usitalo, Usitalo. Anything else you  
7 all wish to add at this point?

8 MS. STORK: No, Your Honor.

9 THE COURT: Mr. King, anything you want to rebut  
10 on the UBS point?

11 MR. KING: Yeah. Just two quick things, Your  
12 Honor.

13 Number one, just to address the paragraph that Ms.  
14 Usitalo just pointed to, I mean, that's a classic conclusory  
15 allegation without any factual detail. It does not say that  
16 UBS AG in particular got any of the funds. Whereas you look  
17 at Paragraphs 333 to 337, it goes into great attempts to go  
18 into great detail about specific fees paid, dates and  
19 amounts paid to the other defendants. It's just absent.  
20 It's just a conclusory lumping in allegation that fails even  
21 to even relate, Your Honor.

22 The second point just to mention on the  
23 jurisdictional issues is I don't think Ms. Stork said  
24 anything that I didn't say to Your Honor earlier, namely  
25 these are three foreign entities that performed services for

1 companies, for foreign companies that themselves invested in  
2 the United States. Luxalpha and Groupement Financier  
3 invested with Madoff, at least according to the allegations.

4 All that is alleged, whether you take it  
5 individually or collectively and holistically as Ms. Stork  
6 wants you to, is that these UBS defendants provided services  
7 abroad to those entities that were doing business in the  
8 U.S. And I think the question Your Honor will have to  
9 answer is is that good enough to assert personal  
10 jurisdiction over those defendants. And I submit that the  
11 law doesn't permit that. Thank you.

12 THE COURT: Very good. Okay. Now where are we?  
13 We had UBS. And now Access.

14 MR. PACCIONE: Yes, Your Honor. Anthony Paccione  
15 on behalf of the Access defendants.

16 THE COURT: The Access defendants?

17 MR. PACCIONE: So I identified those defendants  
18 earlier on.

19 THE COURT: You did. Then let's just say you  
20 referred to them when you put your name on the record. And  
21 then we can go from there.

22 MR. PACCIONE: That's correct, Your Honor. And so  
23 I think for today's purposes, with the Court's permission,  
24 we did move on behalf of the Access defendants on a number  
25 of grounds. But I think for today, I just want to address

1 the jurisdictional arguments given the confusion and some of  
2 the questions that have arisen already. And those  
3 jurisdictional arguments are only on a subset of the Access  
4 defendants. And those include -- and we referred to those  
5 as the JMDs, the jurisdictional moving defendants in our  
6 brief. But the three entities that I want to speak about  
7 and try and clarify in terms of the rules that they serve  
8 include Access International Advisors LTD, Access Management  
9 Luxembourg SA, formerly known as Access International  
10 Advisors Luxembourg SA, and Access Partners SA. And what  
11 I'd like to --

12 THE COURT: Let me interrupt you.

13 MR. PACCIONE: Sure.

14 THE COURT: Because I will tell you I have  
15 questions. And let me give you those questions. And you  
16 don't have to answer them, but I want you to keep them in  
17 mind. Okay?

18 How did the feeder funds work? Was the money paid  
19 to UBS or directly to Luxalpha? The feeder funds are the  
20 initial transferees. If so, how did they get their  
21 knowledge, through Mr. Littaye or Mr. Villehuchet only, or  
22 additional defendants? And you need to take me through  
23 those as you give your presentation. Okay?

24 MR. PACCIONE: Okay, Your Honor. Let me start  
25 with that very broadly. The feeder funds, the two separate

1 feeder funds which include Groupement and Luxalpha are  
2 foreign feeder funds. They were set up, one, Luxalpha as a  
3 SICAV, S-i-c-a-v, and Groupement as an entity. Both, again,  
4 offshore and foreign.

5 They're investors. The people giving the money  
6 over to those funds are all foreign investors. And I'm not  
7 sure that was clear from any of the prior presentations. So  
8 we have foreign investors making investments into foreign  
9 funds.

10 At that point, Your Honor, what happens and how  
11 are those funds administered? The UBS entities have certain  
12 roles. The access entities that I am about to speak about  
13 have certain roles. These entities are all separate,  
14 distinct corporate entities serving different functions.  
15 Some are administrative, some are advisory, some are  
16 management related, but they all serve different functions.  
17 And the point I want to echo is --

18 THE COURT: Well, let me ask you one other  
19 question then. Is there any evidence that they had any  
20 money that was not BLMIS money?

21 MR. PACCIONE: Who is the they, Your Honor, in  
22 that question?

23 THE COURT: All your feeder funds that you're  
24 dealing with -- that you're representing.

25 MR. PACCIONE: So as to the feeder funds, they

1 were to the best of my knowledge a hundred percent invested  
2 in Madoff. As to those two feeder funds, as to Groupement  
3 and Luxalpha. So I don't think there is a dispute about  
4 that.

5 I do want to say this. That the business of  
6 Access and all of the Access entities was not solely with  
7 regard to those two feeder funds. The trustee admits in  
8 their allegations and the complaint that Access' business  
9 wasn't just Madoff. Access' business included 10 to 15  
10 other funds as set forth in Mr. Littaye's affidavit that  
11 were not Access related. And so they had other business  
12 dealings. Those other business dealings with those other  
13 funds basically operate out of the New York office. And a  
14 separate entity called Access International Advisors LLC,  
15 they were a Delaware LLC operating in New York dealing with  
16 those other 10 to 15 other funds.

17 THE COURT: Were those funds segregated? Were the  
18 funds from those entities segregated from BLMIS funds?

19 MR. PACCIONE: Yes. They are completely separate  
20 funds with separate investors --

21 THE COURT: So they're easy to show then, or  
22 relatively easy to show. Okay.

23 MR. PACCIONE: Yes, Your Honor. Okay. So let me  
24 get to the point I think that's at the heart of the motion  
25 on jurisdictional grounds, and that is dealing with the



1 three Access entities that identify -- and I'll go through  
2 each one of them specifically as to what they did. But like  
3 the UBS entities, Your Honor, these were service providers,  
4 providing services outside of the United States to funds  
5 that were located outside of the United States to investors  
6 that were located outside of the United States. They did  
7 not -- they were not investors. These were service  
8 providers collecting fees, which fees were paid outside of  
9 the United States. And so these were completely foreign  
10 entities providing foreign services and receiving fees.  
11 Most of the fees if you look at the chart actually weren't  
12 even directly from the feeder funds to the Access entities,  
13 but they made their way through to UBS entities, who were  
14 all foreign, and then turned over to Access to some degree.

15 So these were, again, purely foreign funds. Not  
16 investors, who were simply collecting their fees for the  
17 services that they rendered. So the question then becomes  
18 what did each one of these three Access entities do and  
19 where were they located?

20 I'm going to start with Access International  
21 Advisors LTD. We'll call them Access LTD. That's a Bahamas  
22 limited company with registered offices in the Bahamas.  
23 They had their own bank accounts in the Bahamas, their own  
24 separate board of directors acting outside of -- acting in  
25 the Bahamas by resolution. They had their own separate

1 ownership. This is a purely foreign firm. And this is what  
2 the trustee alleges it did.

3 ATD -- according to its own -- I'm reading from  
4 Page 22 of the Trustee's brief, Your Honor. It said AIA  
5 LTD was required to keep the net assets of the funds under  
6 surveillance and constant review and carry out reviews and  
7 controls of the portfolio and served as Luxalpha's official  
8 consultant and exclusive introducing agent for potential  
9 investors in Luxalpha. And they quote to Paragraph 89 of  
10 the second amended complaint.

11 Those service, Your Honor, dealing for example  
12 with foreign investors are all rendered outside of the  
13 United States. They do -- as to communications with the --  
14 as for all of these entities, the three entities that I'm  
15 about to talk about, of the 4.5 million documents that  
16 Access produced to the trustee, they found a single fax from  
17 AIA LTD that was sent to BLMIS in connection with requesting  
18 that reports be sent to the New York office for Madoff. A  
19 single fax. None of the phone calls or the purported phone  
20 calls that are listed. A single fax out of 4.5 million  
21 documents that Access produced. They have all of Madoff's  
22 records, and they have records that UBS produced. From  
23 those productions, this is the connection that they're  
24 trying to hold this Bahamian company into the United States  
25 on the basis of a single fax in connection with services,

1 again, all rendered offshore.

2 So, Your Honor, turning then to the second entity  
3 that I want to talk about. These are Luxembourg entities.  
4 And that's Access Management Luxembourg SA. It was known as  
5 Access International Advisors Luxembourg SA. For today's  
6 purposes I think we can call them AIA Lux. And what AIA Lux  
7 is alleged to have done is they had -- they served as  
8 investment advisor under advisory agreements, the advisory  
9 agreements governed under foreign law, signed and executed  
10 outside of the United States. And they were to verify  
11 investment policy was effectively implemented through the  
12 review of trade tickets and advising or making  
13 recommendations as necessary to Luxalpha's management  
14 company.

15 So what that means is that at times some of the  
16 Access entities weren't even advising the funds directly,  
17 but rather were advising some of the UBS entities as  
18 necessary. And so their role was even again further removed  
19 from the United States. Again, not potentially even  
20 demonstrating a purposeful availment of their willingness to  
21 beholden to a court hearing in the United States.

22 That entity did not direct any investments to the  
23 United States. It had no contacts with the forum. It could  
24 not make decisions on behalf of the fund. And so as a  
25 result, Your Honor, it never distributed or received funds

1 on behalf of the investors of the funds. This was a  
2 separate entity providing advisory services offshore. And  
3 again, insufficient as a matter of law, Your Honor, as we  
4 describe in our brief, to demonstrate that it too could be  
5 beholden to the United States on jurisdictional grounds.

6 The third entity -- third and last -- I'm sure  
7 you're thankful for that -- is Access Partners SA, which we  
8 describe as AP Lux. It's a Luxembourg entity. It too  
9 served as Luxalpha's investment advisor for a period of time  
10 from February 2007 until it liquidated. It was also  
11 designated as Groupement's investment advisor. And based on  
12 the trustee's own allegations, AP Lux was responsible for  
13 advising Luxalpha's portfolio managers, UBS, TPM, and AML --  
14 so again, one step removed -- with regard to investment  
15 recommendations. And it was -- AP Lux was entitled to  
16 receive a portion of management and performance fees from  
17 Luxalpha's portfolio manager, not Luxalpha directly. Again,  
18 one step removed. And that just -- again, their own  
19 allegations demonstrate that the monies did not flow  
20 directly from the funds, but even from foreign UBS entities.

21 At some point, AP Lux was also a nominal advisor,  
22 Groupement Financier, for which it received some fees as  
23 well from Groupement's investment manager, not from  
24 Luxalpha.

25 These contacts, Your Honor, unquestionably

1 relationships between foreign entities and actions taken  
2 wholly outside of the United States. They are not -- they  
3 may have helped build the scaffolding for, as the trustee  
4 said, for these foreign funds, but that construction work  
5 was not done in the United States. It was all done outside  
6 of the United States, either in the Bahamas or Luxembourg.  
7 And there was no expectation that these entities who  
8 received fees outside of the United States for these  
9 services outside of the United States could behold into the  
10 United States to return those fees for services that they  
11 properly rendered.

12 That brings us to the -- so that ends the entity  
13 discussion, and that brings us to an individual, Patrick  
14 Littaye, who is an individual defendant. We do move on  
15 behalf of Mr. Littaye to dismiss on jurisdiction of grounds.  
16 Mr. Littaye is a French citizen. He resided either in  
17 France or Belgium during the relevant period and operated in  
18 various capacities. But his principal work was done outside  
19 of the United States in Europe.

20 In order to bring Mr. Littaye into U.S.  
21 jurisdiction, the trustee points to his ownership in some of  
22 the Access entities and also the fact that he was a  
23 corporate officer or director of some of the Access  
24 entities. And, Your Honor, in our brief, we argue that the  
25 ownership of some portions of entities is not sufficient for

1 jurisdictional purposes unless the corporate veil is  
2 pierced. And we go through great lengths to demonstrate  
3 that these corporate entities observed all of their  
4 formalities.

5 With regard to his role as a corporate officer,  
6 the Court would not have jurisdiction over him as his role  
7 as a corporate officer unless the corporation was acting as  
8 his agent rather than vice versa where he is acting as agent  
9 for a corporation. And so for those reasons, those two  
10 prongs don't work.

11 So the trustee then asserts a third prong and a  
12 third argument. And that is Mr. Littaye did attend meetings  
13 in the United States from time to time in connection with  
14 Access broadly speaking. Those meetings did take place in  
15 New York.

16 Pursuant to Mr. Littaye's affidavit, those  
17 meetings were sporadic. They dealt with the US-based  
18 business -- I mentioned the 10 to 15 non-BLMIS funds -- and  
19 were not related to work for the four Luxalpha or  
20 Groupement. They certainly weren't related to subsequent  
21 transfers that were made.

22 And so to the extent that Mr. Littaye had meetings  
23 in New York, there is no sufficient demonstration that those  
24 causes of action for subsequent transfers made to him, which  
25 went from BLMIS to the feeder funds mostly through UBS to

1 some of these other foreign Access entities and ultimately  
2 to Mr. Littaye is insufficient to demonstrate jurisdiction  
3 over him personally.

4 And I do -- I should mention for Mr. Littaye, he  
5 also was not an investor, not an investor in either  
6 Groupement or Luxalpha, but he was an investor in Madoff  
7 through some other funds that's not alleged in the  
8 complaint. But in his affidavit, Mr. Littaye says how he  
9 lost millions of dollars through that investment. So to the  
10 extent that people are trying to create Mr. Littaye as  
11 having actual or any kind of knowledge, he wasn't very  
12 successful since he lost millions of dollars in these other  
13 investments with Madoff to everyone's shock and surprise  
14 (indiscernible) went under.

15 The final point, Your Honor, that I think I need  
16 to address in connection with jurisdiction is I think the  
17 trustee recognizes the difficulty in proving jurisdiction on  
18 an entity-by-entity basis, that the conduct is  
19 extraterritorial and not sufficient to haul those folks into  
20 the United States.

21 So what they have tried to do to get around that  
22 is what I'll call, you know, to demonstrate that the  
23 jurisdictional moving defendants were mere departments of  
24 the Access New York entity, that they try and basically pull  
25 away the corporate separateness of all of these entities.

1           And, Your Honor, we went through a fair amount of  
2       work to demonstrate how there was a distinct structure  
3       between these entities. For the Court's purposes, we  
4       submitted exhibits which show charts. And I think that's  
5       the simplest way for the Court to see the difference between  
6       these entities. For Access Limited, it's Exhibit 40 to Mr.  
7       Littaye's affidavit. For AML, it's Exhibit 19, and for AP  
8       Lux, it's Exhibit 8. And when you look at those exhibits --  
9       and we did have the supporting proof behind those -- they  
10      demonstrate a number of things that prove that there should  
11      be no collective jurisdiction, a piercing of the corporate  
12      veil so to speak.

13           Each one of those entities had their own separate  
14      constituted board of directors that conducted their business  
15      outside of the United States. Each one of those entities  
16      had offices in their respective jurisdictions, either in the  
17      Bahamas or Luxembourg. Each of those entities had separate  
18      contracts with their own separate providers and bore their  
19      own share of expenses. They had independent and different  
20      management teams, they had sperate bank accounts. Each of  
21      those entities were not financially dependent on Access LLC  
22      because they all earned their own fees.

23           And so as a result, when you look at the caselaw,  
24      Your Honor, as to common ownership, of which there was none  
25      -- there was some overlap -- the trustee cannot establish,



1 and I quote, "The nearly identical ownership interest that  
2 must be found before one corporation can be considered a  
3 mere department of the other." And that's citing the Levant  
4 Line case, 166 B.R. 221.

5 The ownership of Access LLC and AIA Inc. on the  
6 one hand and the ownership of each of these other access  
7 entities, the moving entities on the other, are neither  
8 nearly identical nor do they have the degree of commonality  
9 needed to satisfy a mere department showing.

10 There is also the financial interdependence that's  
11 not existent, as I said before. These entities operated  
12 separately, had their own monies coming in, had their own  
13 contracts with service providers, et cetera, going out.  
14 They observed their corporate formalities. Each one had  
15 their own independent directors that did not overlap with  
16 either AIA Inc. or AIA -- or Access LLC, the New York  
17 entities. And there is some executive overlap that did  
18 exist. But that's far below the mirror image symmetry  
19 required to support mere department status. And I'm quoting  
20 from the Reers v. Deutsche Bahn AG, 320 F.Supp. 2d 140  
21 (S.D.N.Y. 2004).

22 And then there's the final point that to try and  
23 get mere department showing, as the trustee talks about the  
24 joint marketing, that somehow there are portions of websites  
25 which talks about access globally. But the Courts have been

1 pretty clear that showing the joint marketing in those  
2 efforts and not segregating every corporate entity when  
3 doing marketing is insufficient to demonstrate mere  
4 department status.

5 And then finally there is arguments about agency  
6 and that the foreign principal has to exercise some element  
7 of control over the in-state agent. But the trustee has  
8 actually done the opposite and the trustee argues and claims  
9 that each of the moving entities, the foreign entities, was  
10 controlled by Access LLC or AIA Inc. And I'm citing to the  
11 opposition brief at Pages 9 to 14 and also Page 17.

12 And this U.S. agent supposedly did not have the  
13 authority to contractually bind the foreign entities and the  
14 agent was not primarily employed by the foreign defendant  
15 and did not engage in similar services for these entities.  
16 The services that were rendered, again, for Groupement and  
17 financier and Luxalpha all took place outside of the United  
18 States.

19 So, Your Honor, with that, I believe that on the  
20 jurisdictional grounds, the claims against the foreign  
21 service providers and Mr. Littaye individually should be  
22 dismissed on the basis of lack of personal jurisdiction.

23 With that, Your Honor, I will rest on my papers  
24 with regard to the other arguments.

25 THE COURT: And who is doing rebuttal?

1 MS. FERNANDEZ: Good morning, Your Honor. Jessica  
2 Fernandez, associate of Baker Hostetler, counsel for  
3 trustee, Irving Picard.

4 I will be arguing on behalf of the trustee in  
5 opposition to the Access defendant's motion to dismiss for  
6 lack of personal jurisdiction. Defendants, Access  
7 International Advisors Limited, Access Management Luxembourg  
8 SA, Access Partners SA, and Patrick Littaye all moved for  
9 lack of personal jurisdiction while Access International  
10 Advisors LLC did not, as it is based in New York.

11 Defendants challenged the sufficiency and accuracy  
12 of our allegations by trying to argue that the various  
13 Access entities were actually separate and distinct.  
14 Looking at the totality of the circumstances, by viewing the  
15 pleading in the light most favorable to the Plaintiff, the  
16 trustee has made a prima facie showing that jurisdiction  
17 exists over defendants by sufficiently alleging that the  
18 Access entities are subject to this Court's jurisdiction as  
19 mere departments of Access International Advisors LLC and  
20 Access International Advisors Inc., its predecessor, both  
21 located in New York.

22 Defendants argue that the Trustee only points to  
23 contacts among foreign entities and actions taken or  
24 performed outside of the United States. Their complaint  
25 sufficiently alleges the contrary. Littaye has had a long-

1 lasting relationship with Madoff since 1985. Stemming from  
2 that relationship, Littaye and Villehuchet created a series  
3 of investment companies, the Access defendants, which  
4 operated as a single business entity. And that same entity  
5 created and serviced the funds, Luxalpha and Groupement  
6 among others, to direct investments in BLMIS in New York.  
7 The primary purpose of these entities was to receive fees  
8 for servicing those funds. To the extent they had any  
9 corporate duties, they were performed by Access personnel in  
10 New York because the Access entities were shell companies  
11 with no regular employees.

12 There was an absence of formalities as well among  
13 the entities. One Access entity often acted on behalf of  
14 another and the employees of Access entities performed work  
15 across all the entities without regard of which entity  
16 formally employed them. Access and its employees also  
17 commonly used collective names such as Access or AIA Group,  
18 emphasizing their operation as a single business entity.

19 The trustee alleges the absence of formalities  
20 amongst the Access entity stemmed from the entity's common  
21 ownership with both Littaye and Villehuchet, who as we  
22 alleged, completely or nearly completely owned, controlled,  
23 or dominated the Access entities. The Access entities were  
24 present in New York through Access International Advisors  
25 LLC and Access International Advisors Limited.

1           This very same issue has actually been litigated  
2           in this jurisdiction in SPV Osus Ltd. v. AIA LLC, an action  
3           stemming from the Madoff fraud where Judge Rakoff found that  
4           what plaintiff pleaded was enough to make a prima facie  
5           showing of jurisdiction over the very same Access defendants  
6           as they were mere departments of Access International  
7           Advisors LLC and found that the requirement of common  
8           ownership of these Access entities was satisfied.

9           Here, the trustee has adequately pled that the  
10          Access entities were mere departments of Access New York.  
11          Even if the Access entities are not viewed as mere  
12          departments of Access International Advisors LLC and Access  
13          International Advisors Inc., this Court should still  
14          emphasize specific jurisdiction over each of the Access  
15          defendants because they directed investments in BLMIS in New  
16          York.

17          These Access entities created, marketed, promoted,  
18          serviced the funds, and these entities did everything to  
19          direct and create the opportunity for investments into  
20          BLMIS. The Access entities created numerous funds,  
21          including Luxalpha and Groupement, and channeled over \$2  
22          billion into BLMIS through these funds. It is undeniable  
23          that Littaye and the Access entities directed investments  
24          into BLMIS, received redemptions from BLMIS, and earned fees  
25          for the services they provided to those funds such that they

1 purposely availed themselves of the benefits of investing in  
2 New York.

3 Mr. Paccione argues that the Access defendant had  
4 other on-BLMIS business. But what he omits to say is that  
5 92 percent of Access revenue stemmed from BLMIS investment.

6 I will now turn to the specific allegations  
7 against each Access entity to establish they directed  
8 investments into BLMIS in New York.

9 As for Access International Advisors Limited, it  
10 was Luxalpha's official consultant and exclusive introducing  
11 agent. It was also Groupement's investment manager,  
12 operator, and investment advisor. As investment manager,  
13 Access International Advisors Limited was required to keep  
14 the net assets of the funds under surveillance and constant  
15 review, carry out reviews and controls of their portfolio.  
16 The purpose of this entity was to be an offshore entity that  
17 was a money box set up to receive fees on behalf of Access.

18 Mr. Paccione points out to a communication with  
19 BLMIS and this entity. That further undercuts the false  
20 suggestion that New York Access entities were only involved  
21 with non-Madoff funds.

22 As for Access Management Luxembourg SA, it was  
23 nominally Luxalpha's portfolio manager. It had to promote  
24 the fund, solicited subscriptions, and receive  
25 (indiscernible) redemptions. It was also Luxalpha's

1 portfolio advisor, advising UBS SA in connection with its  
2 role as Luxalpha's portfolio manager.

3 As for Groupement and Groupement Levered, it acted  
4 as its investment advisor.

5 Access Partners SA was the investment advisor to  
6 Luxalpha. It was also the nominal advisor of Groupement  
7 Financier and Groupement Levered. It was created to protect  
8 Luxalpha and BLMIS from U.S. regulatory scrutiny at the  
9 request of Madoff. Each Access entity received fees for the  
10 services they performed for the funds, and the trustee is  
11 seeking those very same fees.

12 As to Littaye, the Trustee has sufficiently pled  
13 that he had numerous substantive contacts with New York that  
14 establish this Court's jurisdiction over him. Mr. Paccione  
15 again argues that Littaye's meetings in New York were  
16 sporadic and not related to their feeder funds or BLMIS  
17 investment. (indiscernible) is a factual issue, and our  
18 complaint sufficiently alleges the contrary. As the trustee  
19 alleged, Littaye made quarterly visits in New York to visit  
20 Madoff. He attended Access quarterly strategic meetings in  
21 New York. He made sure that he was the sole point of  
22 contact between Access and Madoff. He also closed down the  
23 2006 Chris Cutler investigation in New York himself. Any  
24 issues, questions, or concerns regarding the several access  
25 funds that maintain accounts with BLMIS were addressed by

1 and had to be run through Littaye. Littaye coordinated,  
2 dominated, and controlled Access, serving as a director and  
3 executor for all the Access entities and sat on the board of  
4 directors of both Luxalpha and Groupement.

5 In isolation, these contacts would be sufficient  
6 to support jurisdiction. In their totality, they undeniably  
7 establish that Littaye purposely directed his activities to  
8 New York.

9 Judge Rakoff, again in SPV Osus, already found  
10 that Littaye's quarterly meetings with Madoff in New York  
11 and his efforts to shut down discussions of BLMIS  
12 irregularities in a 2006 meeting in New York were more than  
13 sufficient to make a prima facie case of jurisdiction over  
14 Littaye. The trustee alleges the same facts as well as  
15 numerous others that support specific jurisdiction over  
16 Littaye. The trustee's underlying claims arise out of or  
17 relate to Defendant's contacts as the trustee seeks to  
18 recover the fees the Access defendants received for the  
19 services provided to the funds for directing investment in  
20 BLMIS in New York.

21 In conclusion, Your Honor, the Trustee has made a  
22 prima facie showing of jurisdiction over each of the Access  
23 defendants. And at a minimum, the trustee is entitled to  
24 jurisdictional discovery as the trustee has put forth a  
25 reasonable basis for jurisdiction over defendants.



1 I know that Mr. Paccione has gone into detail as  
2 to the amount of documents produced to date. And if Your  
3 Honor would like me to get into that production, I can do  
4 so. And if not --

5 THE COURT: Wait a second. I would like a summary  
6 of what you received. There is one thing to have volume.  
7 It's another thing to have detail. So tell me what you've  
8 got.

9 MS. FERNANDEZ: Exactly, Your Honor. Although  
10 Access is throwing a high number of documents produced, they  
11 only produced electronic documents from their New York  
12 server. And that included a lot of spam emails and non-  
13 relevant documents. That production also did not include  
14 any paper documents nor the books and records of the other  
15 Access entities. And we have been in communication with  
16 Access counsel regarding the production, and they let us  
17 know that they had already preserved documents in Europe.  
18 And to date we have not received those documents.

19 THE COURT: Mr. Paccione also said something about  
20 that Mr. Littaye was a loser. Is he a net winner or is he a  
21 net loser? Do you know, Mr. Paccione, do you know?

22 MR. PACCIONE: In his affidavit -- declaration  
23 that he submitted, he declares that he was a net loser, Your  
24 Honor. But a net loser -- he invested, again, not through  
25 Groupement or Luxalpha, but through another feeder fund.

1 THE COURT: But he has profits through his fees,  
2 right?

3 MS. FERNANDEZ: Yes, Your Honor. And that's what  
4 we alleged.

5 THE COURT: Okay. Rebuttal -- not just rebuttal,  
6 but anything you want to add?

7 MR. PACCIONE: Yes, Your Honor. I have a couple  
8 of points. I just want to make sure that -- there was a  
9 reference to -- and I want to focus on the Access entities  
10 for a moment. There was a reference to one of them  
11 receiving subscriptions or dealing with subscriptions and  
12 investments. Your Honor, that's not dealing with the  
13 redemptions, for example, from Madoff to the feeder funds.  
14 Rather, these are the entities that interface with the  
15 foreign investors in Groupement and Luxalpha. So the  
16 reference -- there is no allegation still, notwithstanding  
17 what we just heard, not a single allegation of any conduct  
18 by the three corporate entities that we've been talking  
19 about that took place in the United States. Not a single  
20 one.

21 With regard to the SPV Osus decision that's been  
22 bandied about, Your Honor, that was not a subsequent  
23 transfer case. It wasn't a bankruptcy case. It was a tort  
24 case. The court -- the phrase that's being quoted was pure  
25 dictum. He did not rule on jurisdictional grounds on that

1 particular point. He said in dictum given what I'm hearing,  
2 there may be a need for discovery and a hearing on this  
3 jurisdictional aspect. But again, that was a different  
4 case, different claims, some different parties. And most  
5 importantly, Your Honor, in that case, the plaintiffs did  
6 not have access to the millions of documents that have been  
7 produced to the trustee like here. And so Judge Rakoff, if  
8 he was thinking about jurisdictional discovery, it was in  
9 that context.

10 As to that document issue, Your Honor, there were  
11 indeed 4.5 million documents. Because what we did was we  
12 turned over -- my firm, before I took over this case, turned  
13 over the entire server that was in the New York office. So  
14 it was -- it did include junk email. But we said here, you  
15 want it, you can have it. And we gave them everything. We  
16 did make hard copies available. Notwithstanding what I  
17 heard from counsel, those hard copies were actually scanned  
18 and part of the production as based as what we know.

19 And in terms of other documents outside of the  
20 United -- so if the trustee wanted to see what  
21 communications were had from the foreign entities to the New  
22 York office, they have the source of that. They have the  
23 source because they have the entire New York server. There  
24 is no need for jurisdiction to find who else -- what else  
25 was sent directly to the New York office.

1 To the extent that they want to see communications  
2 directly to Madoff in New York, well, they have access to  
3 that because they have tens of thousands of boxes, not to  
4 mention scores of data from Madoff to also demonstrate what  
5 contacts were made from Access Europe to Madoff directly.

6 So this notion that somehow there's jurisdictional  
7 discovery that's needed really just doesn't fly, Your Honor.  
8 They have everything that they need.

9 And it also undercuts, Your Honor, if they're  
10 saying that the New York documents weren't sufficient, then  
11 it sort of suggests that the New York entities weren't the  
12 center of the universe for these foreign funds. If they  
13 were, then they would have seen everything that they need to  
14 see. This proves that the efforts and the energies and the  
15 services that were provided and the monies received all took  
16 place outside of New York and all took place offshore in  
17 Europe, Your Honor. So as a result of that, I think our  
18 jurisdictional arguments -- I think we could rest on our  
19 papers.

20 One other point in terms of employees and shell  
21 companies. There were references to that. I think we  
22 disproved that in the underlying papers in terms of separate  
23 directors, existing bank accounts, fees being earned. And  
24 there are times -- and there's a case cited on Page 11,  
25 Footnote 9, where sometimes employees at times perform work

1 for other entities and had multiple email addresses. But  
2 that's enough to disregard the corporate form. And that's  
3 the (indiscernible) case on Page 11, Footnote 9.

4 So, Your Honor, unless the Court has any other  
5 questions, we will rest.

6 THE COURT: Anything anyone wishes to add on the  
7 Access, Littaye, and Villehuchet? Yes, ma'am.

8 MS. FERNANDEZ: Nothing from me, Your Honor.

9 THE COURT: Well then now we are at the motion to  
10 dismiss by Theodore Dumbauld.

11 MR. KNUTS: Good afternoon, Your Honor. Again,  
12 it's Robert Knuts from the Sher Tremonte firm for Defendant,  
13 Theodore Dumbauld.

14 Unlike the prior arguments, I can say that Mr.  
15 Dumbauld is fully subject to this Court's jurisdiction as an  
16 American. In fact, a graduate of the Naval Academy. So I  
17 won't be talking at all about jurisdiction.

18 THE COURT: Okay.

19 MR. KNUTS: In our papers, the motion to dismiss,  
20 we presented several arguments in favor of that motion. I  
21 want to focus my time today on one of those. And that is  
22 the employee compensation issue.

23 At Page 29 of our moving brief, we quoted from a  
24 case called Geltzer, which concluded that an officer or  
25 employee who is the recipient of a salary from a company

1 that received an allegedly fraudulent transfer is not  
2 without more the subsequent transferee of the conveyance.

3 The trustee addressed this argument in their  
4 opposition brief at Page 69 and essentially tries to rebut  
5 that in three ways. I mean, first, the Trustee claims that  
6 he is unable to confirm that the only money transfers made  
7 to Mr. Dumbauld were in the form of employee or officer  
8 compensation. But that --

9 THE COURT: Let me stop you right there, because  
10 that was one of my questions. Have you given that brief to  
11 the trustee?

12 MR. KNUTS: Well, back in the Rule 2004 days, we  
13 turned over all the documents they asked for. I assumed  
14 that on the server, the Access server it included, you know,  
15 payroll documentation and everything --

16 THE COURT: But you didn't break it out yourself  
17 and even make yourself aware of that. Basically where did  
18 the money come from if it wasn't from BLMIS, that's...

19 MR. KNUTS: Well, as the trustee has alleged in  
20 both the first amended complaint and the second amended  
21 complaint and as Mr. Paccione mentioned earlier, Access in  
22 New York had other services that they provided to clients  
23 relating to completely unrelated funds. You know, it had  
24 nothing to do with BLMIS. For example --

25 THE COURT: But you didn't break it out even for

1       yourself.

2               MR. KNUTS: In terms of -- well, first of all, by  
3       the time this case started, Mr. Dumbauld had long left the  
4       employment of Access. And I have not had the ability to go  
5       back into Access's payroll records to determine what  
6       percentage of income related to BLMIS versus --

7               THE COURT: Well, just so you know, because the  
8       trustee has alleged that only five percent of that business  
9       was not BLMIS. So I was just curious if you did that for  
10      your own sake or when you're making these arguments you too  
11      have already done your own research on this. And your  
12      answer is no.

13              MR. KNUTS: Without Access, I couldn't do the same  
14      research that Mr. Paccione could do or others. But I will  
15      point out, Your Honor, that there have been -- the Trustee  
16      has made different allegations about different time periods.

17              For example, in the first amended complaint, he  
18      alleged during 2005 that Access's BLMIS revenue was only 61  
19      percent of its total revenue. And now in the second amended  
20      complaint, it does say by 2008 that it had grown to 92  
21      percent. So it did vary over time.

22              THE COURT: Yeah, but I was just asking for your  
23      own sake, your arguments, if you'd looked. Okay.  
24      (indiscernible).

25              MR. KNUTS: Sure. Well, one thing I know for

1 sure, Your Honor, and that is the amount of revenues that  
2 were unrelated to BLMIS at Access more than covered the  
3 monies paid to Ted Dumbauld. That's absolutely for certain.  
4 I mean, the total -- they had revenues in excess of the  
5 \$1.25 million that the trustee alleges was received by Mr.  
6 Dumbauld during the relevant time period and could involve  
7 subsequent transfers. We know for sure that there was a lot  
8 more money going through Access than that. But --

9 THE COURT: Of course he wasn't the only expense.  
10 But that's another point.

11 MR. KNUTS: Absolutely, Your Honor. But what I  
12 want to -- so a couple of things just turning back to this,  
13 a little hint in saying he doesn't have the ability to  
14 confirm that the only money received by Mr. Dumbauld was  
15 compensation, employee compensation. In fact, Paragraph 337  
16 of the second amended complaint says that the \$1.25 million  
17 wasn't, you know, officer employee compensation. So he  
18 cannot say in his opposition papers something that's  
19 inconsistent with the actual allegation in the second  
20 amended complaint. He's made the affirmative obligation  
21 that it was compensation, and he should be stuck with that.  
22 And actually, he is stuck with that because that's the  
23 section (indiscernible).

24 The second argument that the trustee makes  
25 concerning how he's not bound by the Geltzer case is that he



1 argues that the second amended complaint includes  
2 allegations that Mr. Dumbauld did not receive his  
3 compensation in good faith. But when you look at the  
4 allegations that he relies on on Page 69 and you actually go  
5 back and read those allegations that are in the second  
6 amended complaint, you'll see there's no factual allegation  
7 that Mr. Dumbauld ever acted in bad faith. The factual  
8 allegations concerning Mr. Dumbauld are he was given an  
9 assignment to analyze Madoff trading, he performed that  
10 assignment, he provided the results of his analysis to his  
11 superiors at Access. He was then told to get somebody else  
12 to take a look at the analysis. He did. He found who the  
13 trustee believes is extremely competent, Mr. Cutler, to  
14 conduct another analysis. And he then facilitated Mr.  
15 Cutler to report those results to the people at Access, his  
16 bosses.

17 There is nothing -- in every step of the way, Mr.  
18 Dumbauld did the right thing. He did the work honestly, he  
19 reported honestly. He described exactly what he learned.  
20 Mr. Cutler, he did nothing to interfere with Mr. Cutler,  
21 describing what Mr. Cutler learned. You know, there's no  
22 allegation in the second amended complaint that Mr. Dumbauld  
23 as an individual had any authority to do anything else at  
24 Access with that information. And so in fact there is no  
25 allegation in the second amended complaint that he acted in

1 bad faith in some way at any point in time.

2 And then lastly, the trustee makes the argument  
3 that it's unclear in some way whether the compensation that  
4 Mr. Dumbauld received as an employee and officer of Access  
5 was received "for value". Because he says that that's  
6 another ground for getting out from the Geltzer decision.  
7 But again, there is nothing in the second amended complaint  
8 that actually alleges that Mr. Dumbauld did not provide  
9 value for that compensation. It's just not there. And  
10 without an affirmative allegation saying that this was --  
11 that services were provide for no value, you don't have a  
12 claim. It's just not the case that you can sort of say  
13 there may be other issues here. You know, you have to  
14 actually affirmatively say that there's an issue in a  
15 complaint in order to make a claim.

16 So I think the sum and substance of the Geltzer  
17 argument about employee compensation is that you can in fact  
18 under the right circumstances make specific -- as a trustee  
19 make specific allegations to put an employee's compensation  
20 in play as a subsequent transferee. But if Your Honor were  
21 to deny Mr. Dumbauld's motion to dismiss when there are no --  
22 - those type of allegations don't actually exist in the  
23 second amended complaint, then I think it could create a  
24 really problematic precedent for future Ponzi cases and  
25 future trustees. You know, they would be encouraged to name

1 other employees trying to claw back compensation just  
2 because the compensation was received during a time period  
3 when there was also initial transfers that could have flowed  
4 downwind. And it's not going to be just the Ted Dumbaulds  
5 of the world who are then subject to that kind of claim.

6 And so I would urge Your Honor to really hold the  
7 trustee's obligation, you know, hold them to the obligation  
8 that the Geltzer case said, which is if you've got actual  
9 allegations, specific factual allegations of bad faith or no  
10 value for the compensation, then okay, maybe you can tag an  
11 employee with possibly getting his compensation clawed back.  
12 But because that's not here, Your Honor should dismiss Ted  
13 Dumbauld from this case.

14 I mean, if you look at the second amended  
15 complaint on Page 83, they put together a chart showing all  
16 the funds flows and everything else. And there's Ted  
17 Dumbauld, floating somewhere on the page. You know, without  
18 any lines drawn to him, anything, just because he received  
19 compensation during a relevant time period. That's not what  
20 a subsequent transferee case should be involving an  
21 employee. And for the rest of our arguments, we'll rest on  
22 what we put in our papers. Thank you.

23 THE COURT: Rebuttal? Yeah, you were on mute. We  
24 didn't get your name.

25 MS. USITALO: Sorry about that. Michelle Usitalo,

1 Baker Hostetler, for the trustee, Your Honor. And I am  
2 responding to a few issues here under the arguments that the  
3 defendants have made on the 12(b)(6) issues.

4 I can address first some of the arguments that  
5 were just raised with respect to Mr. Dumbauld specifically  
6 and then I will turn to some of those other --

7 THE COURT: Did you not do that when we were  
8 having the argument earlier? I'm missing something here.

9 THE COURT: Yes. Sorry, Your Honor. No, I am  
10 addressing -- so it was -- Mr. King addressed the issues of  
11 the Trustee's allegations concerning actual knowledge and  
12 also generally the issues of the sufficiency of the  
13 Trustee's pleadings with respect to customer property for  
14 each of the defendants. And I know that we've touched on  
15 parts of the customer property issue already, but I did have  
16 some further joinders that apply to all of the defendants --

17 THE COURT: Okay. I'm a little flummoxed because  
18 I thought we addressed those at the time we were addressing  
19 them.

20 MR. USITALO: Apologies, Your Honor --

21 THE COURT: You're going to do the lumping.

22 MR. USITALO: Well, that -- apologies, Your Honor.  
23 As we were addressing the personal jurisdiction issue  
24 specifically with respect to each defendant --

25 THE COURT: Okay, all right. But answer Mr. Knuts

1 first.

2 MR. USITALO: Okay, I will do that. And I think  
3 as Your Honor pointed out, the issues here too are the fact  
4 that the Trustee has alleged in a plain statement in his  
5 complaint, which is all that's required at this stage of the  
6 litigation, that Mr. Dumbauld received the \$1.2 million in  
7 transfers. And we allege that it was at least that amount  
8 in compensation. But to note, Mr. Dumbauld was also a  
9 partner of Access LLC and he was also the chief investment  
10 advisor. So there could be additional transfers there as  
11 well as a result of fees that Access received and their LLC  
12 received in their role.

13 But particularly too on the point with the fact  
14 that it is compensation that is being alleged, we did allege  
15 the more that Mr. Knuts was referring to. And I know he  
16 characterized it in a certain way, but that's not what is  
17 appropriate here. It's the Trustee's allegation that must  
18 be taken as true and inferences made in his favor. And the  
19 Trustee has alleged that when concerns were raised about  
20 Madoff's trading activity that Mr. Dumbauld, as Access's  
21 chief investment advisor, was asked to perform an analysis  
22 of that trading activity, and he could not confirm that the  
23 trading activity was taking place. And then when he was  
24 asked to get a second opinion and they hired Mr. Chris  
25 Cutler to perform a similar analysis, this resulted in Mr.

1 Cutler coming to Mr. Dumbauld and telling him -- and this is  
2 quoted in the trustee's complaint -- that if BLMIS were a  
3 new investment, he would likely shove it out the door.

4 Mr. Dumbauld was also present at the meeting where  
5 this analysis was presented to Littaye and Villehuchet. So  
6 there is the more here that is required. And the trustee  
7 doesn't have to prove those allegations at this point, just  
8 merely allege that there is more to just Mr. Dumbauld being  
9 an employee of Access. He was an integral part of Access  
10 and he had the more that is required here.

11 THE COURT: Excellent. And I apologize to you  
12 because I think I did basically let you reserve your  
13 jurisdictional rebuttal. And I took a break instead of  
14 listening to you. So I apologize.

15 MR. USITALO: No, that is no problem.

16 I will turn to the arguments that the defendants  
17 have made with respect to 546(e) and the --

18 THE COURT: You're talking about UBS now, right?

19 MR. USITALO: I am talking about UBS because they  
20 -- I'm sorry. UBS has made the arguments today, but --

21 THE COURT: Non-jurisdictional, right.

22 MR. USITALO: Non-jurisdictional, yes. All of the  
23 parties have taken -- made the same arguments in their  
24 papers as well as adopted the arguments of UBS. So I  
25 believe it was Mr. King who was presenting those arguments

1 today, but all of the Defendants participated.

2 THE COURT: Okay.

3 MR. USITALO: And since they didn't touch -- since  
4 Mr. King didn't touch on the legal arguments of 546(e) and  
5 Your Honor has already addressed those, we too will rely on  
6 our papers in that respect.

7 But I do want to address the defendant's arguments  
8 that the trustee has not adequately pled that Luxalpha and  
9 Groupement, the initial transferees, have the requisite  
10 actual knowledge that permits the trustee to pursue his  
11 claims for avoiding transfers beyond the two years.

12 And I know it's been mentioned already, Your  
13 Honor, but it's important again to emphasize that the  
14 standard here is that the trustee's allegations must be  
15 taken as true and all inferences made in his favor. And  
16 when that analysis is performed here, those inferences make  
17 out a plausible claim.

18 And we've discussed it quite a bit here today, but  
19 both Luxalpha and Groupement are groups that operated solely  
20 through their agents. And this includes the UBS defendants  
21 and the Access defendants that were acting as directors and  
22 service providers. And the trustee has alleged that the  
23 conduct and knowledge of those defendants should thus be  
24 imputed to Luxalpha and Groupement. And the trustee has  
25 also pled in his allegations that Luxalpha and Groupement

1 had actual knowledge that BLMIS and that the defendants knew  
2 that BLMIS was operating a fraud and that Luxalpha and  
3 Groupement's agents knew that Madoff could not be executing  
4 all the securities transactions he reported. Specifically,  
5 Luxalpha and Groupement knew, the trustee alleges, that the  
6 volume of options trades Madoff purported to execute on  
7 their behalf was impossible and that Madoff lied about the  
8 identify of his purported options counterparties and that  
9 Luxalpha and Groupement knew that the returns BLMIS claimed  
10 to produce were impossible given its stated trading strategy  
11 and that Luxalpha and Groupement knew that BLMIS reported  
12 trades as having been made at impossible times and prices  
13 and that these funds' agents were aware of signs of fraud at  
14 BLMIS and that Patrick Littaye actively impeded any inquiry  
15 into the signs of fraud by quashing and deflecting  
16 questions. And the trustee alleges that Luxalpha and  
17 Groupement's awareness of BLMIS' impossible trading activity  
18 and performance, demonstrable awareness of the fraud and the  
19 directors' and managers' deliberate actions to protect  
20 Madoff established defendant's knowledge of fraud. And the  
21 trustee goes on at length in his complaint to provide  
22 allegations in support of this.

23 And it's the trustee's position that all of those  
24 allegations that filled all of our screens when Mr. King was  
25 speaking amount to a totality of -- the totality of



1       allegations that amount to actual knowledge. And I note as  
2       well that some of those allegations that were up on the  
3       screen in those particular allegation callouts, there were  
4       allegations that the trustee has alleged that the defendants  
5       knew. I noted those parts weren't highlighted, but they  
6       were there.

7               And in going through the trustee's allegations, I  
8       think we first must begin with the allegations that the UBS  
9       and Access defendants deliberately deceived the Luxalpha --  
10      sorry, the Luxembourg regulator, which was referred to as  
11      the CSSF, by failing to disclose BLMIS' multiple roles in  
12      the fund. Luxalpha, as we noted, has filed their answer in  
13      this proceeding. And in its answer, Luxalpha admitted that  
14      the purpose of the USITC's regulations is to protect against  
15      fraud, and the UBS defendants and Access defendants set up a  
16      structure for Luxalpha that was not in compliance with  
17      USITC's regulations, and the Access defendants knew this.

18              And how do we know they knew? Because the trustee  
19      alleges that Access had originally operated (indiscernible)  
20      another BLMIS feeder fund, with BNP Paribas acting as the  
21      sponsor of the fund. And in a meeting with Access, BNP said  
22      that BLMIS' role as both custodian and investment advisor  
23      was unconscionable, violated BNP's internal security rules,  
24      and Luxembourg law. And BNP proposed a path forward to  
25      address these concerns and said they either needed to

1 identify BLMIS to the CSSF or get real-time trading access  
2 from Madoff. Madoff said no, BNP said it would not go  
3 forward, and (indiscernible) closed. But Access moved on  
4 and opened Luxalpha without missing a day of investment with  
5 BLMIS. And this time, UBS acted as its sponsor.

6 In deliberately deceiving the CSSF and not  
7 identifying BLMIS' multiple roles for Luxalpha, the Access  
8 and UBS defendants aren't overlooking laws and regulations  
9 to make money; they are purposely circumventing laws meant  
10 to prevent fraud, to expose people like Madoff. And they  
11 aren't overlooking; the trustee alleges they are lying.  
12 Lying to the CSSF, withholding information to the SEC about  
13 whether or not they acted as a counterparty to Madoff,  
14 helping Madoff avoid SEC scrutiny by setting up an Access  
15 entity that purportedly acted as an investment advisor.

16 But why tell these lies? Why prevent Madoff from  
17 being exposed? Why go to such great length to perpetuate a  
18 structure that allows fraud? The inference that can be  
19 drawn here is that they did it because they knew. And this  
20 knowledge belongs to the funds, Luxalpha and Groupement,  
21 because it was their agents and their service providers that  
22 told these lies and that took these actions.

23 The trustee alleges that UBS and Access both had  
24 anti-fraud due diligence procedures in place. Did BLMIS go  
25 through these procedures? The trustee alleges it did not.

1 Why did it not? The inference that can be drawn here is  
2 because Luxalpha's service providers knew that BLMIS would  
3 not pass. Some due diligence occurred when someone raised a  
4 flag about Madoff's trading. And I mentioned this. And it  
5 was first Mr. Dumbauld as Access's chief investment officer  
6 that reviewed the trading activity and confirmed that the  
7 options trades purportedly being made by Madoff didn't  
8 appear in the database as they should of.

9 Then Access hired Chris Cutler to perform that  
10 analysis and other analysis, and he did perform that  
11 analysis. And as a result, Cutler recommended that Access  
12 exit all investments with BLMIS. And he shared the results  
13 of his inquiry with Littaye and Villehuchet. And what did  
14 they do? They cut Cutler's investigation short and  
15 suppressed his findings.

16 Now, I know the defendants in their papers and in  
17 their arguments today may offer alternative explanations for  
18 these conducts or these statements. But these explanations  
19 are not relevant at this stage of litigation where it is the  
20 trustee's allegations that must be taken as true. And the  
21 trustee alleges that Access and UBS defendants' conduct  
22 reflects their knowledge of Madoff's fraud.

23 And to give an example, UBS takes the Trustee's  
24 allegations of the knowledge of fraud and claims that these  
25 allegations just plead that UBS had different risk

1 tolerances. Again, this explanation is irrelevant, but it  
2 also opens the door for further questions. Risk of what?  
3 Risk that Madoff's fraud would be exposed? UBS's argument  
4 simply illuminates that perhaps UBS was willing to act as  
5 Luxalpha and Groupement's service provider because the  
6 potential for income was so great that it was worth it in  
7 the event that Madoff's fraud was never exposed. In fact,  
8 the trustee alleges that this was UBS's very thinking.

9 Business is business was an instruction from a  
10 Luxalpha director and UBS managing director. We cannot  
11 permit ourselves to lose \$300 million. Accept client. The  
12 plausible inference from this statement was not that they  
13 didn't have actual knowledge of Madoff's fraud. Instead,  
14 that they didn't care if they did. And in any event, it  
15 presents a question of fact.

16 And defendants make a point about the trustee's  
17 allegations of red flags. But these allegations also serve  
18 to support the trustee's allegation of actual knowledge.  
19 The trustee does not list red flags in such a way that has  
20 been found in other cases to be insufficient to plead actual  
21 knowledge or willful blindness. The complaint alleges  
22 concrete examples of instances where the defendants  
23 recognized these red flags and saw them for what they were;  
24 evidence of trading that was impossible.

25 And as noted, neither Mr. Dumbauld nor Mr. Cutler

1 confirmed that Madoff -- could confirm that Madoff was  
2 making his options trades. Both Mr. Cutler and UBS noted  
3 that Madoff's strategy could not produce the returns  
4 reported. UBS identified out-of-range prices in a BLMIS  
5 trade confirmation and Access knew that the appointment of  
6 Friehling & Horowitz as BLMIS' auditor caused concern. And  
7 in response, Littaye gave the instruction, don't go further.

8 And with respect to counterparties, Chris Cutler  
9 noted, "I just can't find the other side of the trade." And  
10 when a Swiss private bank directly asked Madof to identify  
11 the counterparties, Madoff called Littaye with an  
12 explanation that Littaye didn't understand and Villehuchet  
13 asked the bank to stop contacting Madoff.

14 And when the SEC came to UBS in the U.S. and asked  
15 if one of its affiliates was acting as one of Madoff's  
16 counterparties, UBS told the SEC they would have to go ask  
17 the affiliates themselves.

18 THE COURT: I have a question.

19 MS. USITALO: Sure.

20 THE COURT: You keep talking about the UBS  
21 affiliates. Are you talking about SA, are you talking about  
22 AG? How are you -- link those for me.

23 MS. USITALO: So with respect to the review of the  
24 trading activity, it was UBS SA and the custodian and  
25 administrator that were reviewing those statements and

1 confirmations. So it's different allegations for each.

2 There were instances where UBS AG was --

3 THE COURT: I know there were. But I have read  
4 every word of your complaint. And I want the answer to that  
5 question.

6 MS. USITALO: Which allegations we are alleging  
7 that UBS SA had -- sorry, which UBS entity had which  
8 knowledge?

9 THE COURT: Exactly.

10 MS. USITALO: Okay. So it is in -- UBS SA is the  
11 one that identified out-of-range trade prices in the BLMIS  
12 trade confirmations.

13 THE COURT: I want to just say something right  
14 now.

15 MS. USITALO: Okay.

16 THE COURT: Every time you use UBS, please be  
17 specific.

18 MS. USITALO: Will do, Your Honor. And I want to  
19 then clarify to you when I am talking about that -- I had  
20 made the statement that UBS noted Madoff strategy. That was  
21 UBS AG.

22 THE COURT: Okay.

23 MS. USITALO: And actually lastly, Your Honor, I  
24 was just going to make -- to note that Luxalpha, with  
25 respect to the counterparties, reported to its auditors that

1 BLMIS' option counterparties were approved by UBS AG, even  
2 though we know that could not be the case.

3 THE COURT: Explain that then.

4 MS. USITALO: Because there were no counterparties  
5 to approve.

6 THE COURT: Oh, okay.

7 MS. USITALO: And, Your Honor, just in conclusion  
8 with respect to actual knowledge, I think these allegations  
9 that I've just been through taken together and viewed in the  
10 light most favorable to the trustee satisfy the trustee's  
11 burden of alleging actual knowledge and support the  
12 trustee's ability to pursue claims to avoid the transfers  
13 made to Luxalpha and Groupement beyond the two-year period.

14 And so I would like to finally just go and touch  
15 on the arguments that the defendants have made with respect  
16 to the trustee's allegations on the recovery under Section  
17 550 of the subsequent transfers. And at this stage what the  
18 trustee must do to move beyond the pleading stage and  
19 recover subsequent transfers from the defendants is to  
20 provide the defendants with a short and plain statement of  
21 the claim showing that the pleader is entitled to relief.  
22 And the trustee has done so by alleging throughout the  
23 second amended complaint that these defendants who acted in  
24 various capacities as service providers to Luxalpha and  
25 Groupement received subsequent transfers of BLMIS customer

1 property as service provider fees.

2 THE COURT: Again, you're lumping them all  
3 together, correct? You're not giving me which UBS we're  
4 dealing with.

5 MS. USITALO: In this instance, Your Honor, we are  
6 alleging that each one of the UBS entities -- so that would  
7 be UBS AG, UBS SA, UBS FSL, and UBS TPM all received fees as  
8 service providers to Luxalpha and Groupement. And I will  
9 try -- I apologize --

10 THE COURT: Make sure the record is clear.

11 MS. USITALO: Okay. As I believe Mr. Paccione  
12 said earlier, there's really no dispute here that a hundred  
13 percent of Groupement and Luxalpha's assets were invested  
14 with BLMIS and Luxalpha also in its answer admits this and  
15 admits that all of the UBS SA, UBS AG, UBS SFSL, and UBS TPM  
16 and all of the Access defendants as the trustee has defined  
17 them, AP Lux -- sorry, I have them all right here -- AIA  
18 Limited, AIA -- I want to -- AIA LLC, Access International  
19 Advisors Limited, and Patrick Littaye, Mr. Villehuchet, and  
20 Mr. Dumbauld all received fees as directors and service  
21 providers.

22 And what the Defendants are arguing here is that  
23 the trustee has not linked the transfers from Luxalpha to  
24 these defendants as originating as BLMIS customer property.  
25 Each defendant has disputed this. And UBS makes arguments -



1 - UBS SA makes the argument that it tries to force the  
2 trustee to perform a specific tracing exercise of linking  
3 the initial transfers made to Luxalpha and then to UBS SA as  
4 we saw with Mr. King on Mr. King's slide. But that is not  
5 what is required at the pleading stage.

6 In the complaint, the trustee need only show the  
7 relevant pathways through which transfers were received.  
8 And the trustee has certainly done that both in describing  
9 the various roles held by each, detailing timeframes, and  
10 identifying amounts received as service provider fees, and  
11 quite literally, as has been pointed to a few times today,  
12 in Paragraph 340, which we provide a chart that draws out  
13 the pathways of transfers from BLMIS and on to each of the  
14 defendants -- would you like me to go through each one as  
15 represented in the chart, okay -- Each of the defendants  
16 that were made by Luxalpha and Groupement.

17 And it's correct, as the defendants have pointed  
18 out, that the allegations in this complaint are different  
19 from some of the cases that have been recently before Your  
20 Honor to require subsequent transfers from Fairfield Sentry.  
21 And there's a reason for that. In those cases, the trustee  
22 received records from Fairfield Sentry's administrator,  
23 Citco, which are the books and records of Fairfield Sentry  
24 and which reflect the payments into and out of Fairfield  
25 Sentry.

1           We don't have that here. We don't have a  
2           production of all of the books and records of Luxalpha and  
3           Groupement. And yes, the trustee has received some  
4           productions. And in those, there were audited financial  
5           statements, invoices, and fee agreements. And it's from  
6           those documents that the trustee was able to make the  
7           allegations he did concerning the subsequent transfers. But  
8           those documents don't provide the details and they don't  
9           provide the complete picture.

10           And as Your Honor has recently noted in the  
11           decision in Picard v. Mayer, the trustee has made his  
12           allegations here as an outsider to these transactions. And  
13           in some cases, these transactions are several layers deep.  
14           And as Your Honor also recently held in Picard v. First Gulf  
15           -- and I'll quote from the decision, "In order to determine  
16           how Fairfield Sentry spent the billions of dollars it  
17           received from BLMIS, this court would need to review  
18           financial documents in order to trace the monies to all of  
19           Fairfield Sentry's principals, insiders, creditors, and  
20           customers. Undoubtedly, the court will trace and calculate  
21           how Fairfield Sentry spent its BLMIS funds at a later stage  
22           of litigation. At this stage, the trustee need only assert  
23           allegations that make it seem plausible that defendant  
24           received BLMIS monies." And these are the very  
25           circumstances that we have here with Luxalpha and

1 Groupement.

2 It is not a case, like the defendants argue in  
3 Picard v. Shapiro. In that case, there were allegations  
4 where the trustee made on information and believe that the  
5 BLMIS accounts were funded by subsequent transfers without  
6 more. And there, the court found that the trustee didn't  
7 give enough information to make the plausible inference that  
8 these funds were BLMIS customer property. But that's not  
9 the case here, where the trustee has alleged the involvement  
10 of all of the service providers in Luxalpha and Groupement  
11 and that all of the service providers were paid fees as  
12 service providers of Luxalpha and Groupement. And as we've  
13 previously noted, Luxalpha and Groupement's assets were  
14 invested with BLMIS. It was their only business and thus  
15 the plausible inference can be made that these subsequent  
16 transfers were BLMIS customer property.

17 And I know we got in earlier to the specific  
18 allegations about UBS AG, and I pointed Your Honor to those  
19 particular allegations. And I believe in response, Mr. King  
20 said that this may not even amount to the Rule 8 pleading  
21 standard. And that's not the case. And we look to Picard  
22 v. Chase. And in that case, the court found that the  
23 trustee's complaint met the Rule 8 standard by adequately  
24 apprising the defendants there of the subsequent transfers  
25 at issue where the complaint set out the initial transfers

1 in Exhibit B to the complaint and then alleged, and this is  
2 a quote, that "some or all of these transfers were  
3 subsequently transferred to defendant Chase and/or other  
4 defendants in the form of commissions or fees, transfers  
5 from one account to another, or another means." And that  
6 was sufficient to apprise the defendants.

7 And as Your Honor -- and Your Honor cited to  
8 Picard v. Chase in Picard v. Mayer. And there was a similar  
9 set of circumstances where there were various levels of  
10 transfers. And there Your Honor pointed to the quote from  
11 Picard v. Chase where the moving defendants are a group of  
12 interrelated individuals and entities and whether they  
13 additionally received subsequent transfers of BLMIS funds  
14 from one another is a question to which they and they alone  
15 have the requisite information to respond.

16 And we have not received -- we do not have yet the  
17 documents that we would need to identify these specific  
18 subsequent transfers. We do not have the books and records  
19 from Luxalpha or Groupement or from the Access entities. We  
20 don't have bank statements from the defendants. And these  
21 are the documents that would assist the trustee and the  
22 Court with figuring out how Luxalpha and Groupement paid  
23 their agents and service providers.

24 And unless Your Honor has any questions, I have  
25 nothing further.

1 THE COURT: Thank you. Mr. King, I see that you  
2 are off mute, so do you want to rebut?

3 MR. KING: Yeah. The hour is late and I will be  
4 short, Your Honor. Because --

5 THE COURT: Where are you? It's still pretty  
6 early here.

7 MR. KING: Fair enough. I'm happy to go on and  
8 on, but I don't think the 69 other people on this Zoom would  
9 appreciate that. So I will be very quick.

10 First thing. On the issue of actual knowledge.  
11 The one thing you didn't hear Ms. Usitalo speak about was  
12 the standard of what one needs to show; a high level of  
13 certainty and an absence of substantial doubt. Everything  
14 she said about knowing about impossibility of returns and  
15 trading outside the daily close and inability to identify  
16 counterparties was alleged in the Merkin case and the judge  
17 there held that's not good enough. At most it was willful  
18 blindness. He did find willful blindness, meaning a strong  
19 suspicion but at least some doubt. But he held that did not  
20 constitute, even with all inferences in the favor of the  
21 plaintiff -- the trustee here, same plaintiff -- an actual  
22 knowledge that no securities were being traded.

23 I urge Your Honor to read the Merkin case, 515  
24 B.R. 117. And you'll see that the allegations --

25 THE COURT: (indiscernible) I haven't read them

1 all already

2 MR. KING: I would urge you to reread the Merkin  
3 case, Your Honor. Because the allegations there are  
4 equivalent in many respects and go beyond anything that's in  
5 the current complaint. And it just doesn't satisfy actual  
6 knowledge.

7 On the subject of the subsequent transfers, I am  
8 not demanding dollar-for-dollar tracing. I get that that is  
9 an issue for the most part to be decided later. But on the  
10 face of the complaint, it is impossible to have made \$32  
11 million in subsequent transfers when you've only received  
12 \$16 million in initial transfers. They know the initial  
13 transfers are only \$16 million through 2006, and yet they  
14 are claiming subsequent transfers through 2006 of \$32  
15 million. That's not plausible. That's not possible. Math  
16 doesn't allow that to happen. And I have heard no  
17 explanation --

18 THE COURT: Let's just not be there yet, Mr. King.  
19 I've heard your argument.

20 MR. KING: Lastly, I've heard no explanation as to  
21 what happened to that subparagraph D of the proposed second  
22 amended complaint that was filed five -- longer than that  
23 now, 2015, where there was an actual allegation about monies  
24 received by UBS AG. It's not in the current complaint.  
25 It's gone. And there is an allegation as to every other

1 defendant. It is not enough just to parrot the language of  
2 550 and say you got something, I am entitled to recover it.  
3 You need some factual allegation under the Supreme Court  
4 standards. That's all, Your Honor.

5 THE COURT: Okay. Anyone else wish to be heard?

6 MR. KNUTS: Your Honor, just briefly on  
7 behalf of Mr. Dumbauld.

8 THE COURT: Sure.

9 MR. KNUTS: Counsel for the trustee spent part of  
10 her time talking about how Mr. Dumbauld acted in good faith  
11 and presented information that they are now using to try to  
12 hold the Access defendants liable. It seems to me that you  
13 cannot hold an employee liable for a return of compensation  
14 just by attending a meeting, just by reporting accurately  
15 the information that he developed to the people who could  
16 make decisions at the company. And to hold otherwise, to  
17 say that somehow there's an allegation --

18 THE COURT: That's called an affirmative defense.  
19 Okay.

20 MR. KNUTS: No, the Geltzer case said it was not -  
21 - in this context that it was not an affirmative defense.  
22 So I would just ask Your Honor to see whether you agree with  
23 that or not. Thank you.

24 THE COURT: Thank you. Anyone else wish to be  
25 heard?

1 Thank you, everyone. Interesting arguments.

2 Interesting. We will obviously get a written opinion. Or

3 two or three. I don't know how I'll put them together.

4 Okay, everyone. Have a great day. Be safe. Enjoy the

5 weather. Bye.

6 (Recess)

7 THE COURT: Apologize, everyone. I went to

8 chambers by basically sounding like I dismissed everyone.

9 And I was reminded that I did not dismiss everyone, that I

10 could go to chambers and talk, but I have other matters on.

11 So I apologize profusely to everyone that I did it in the

12 way that I did it. And chambers told me to leave them alone

13 and come back to you all. So, very good. Give me one

14 moment to get to where I am.

15 We are at 10-05358, Picard v. Citibank. And that

16 is -- yes, very good.

17 State your name and affiliation.

18 MR. CHARLEMAGNE: Good afternoon, Your Honor.

19 Chardaie Charlemagne on behalf of the trustee.

20 Good afternoon, Your Honor. Carmine Boccuzzi,

21 Cleary Gottlieb on behalf of Citigroup Global Markets

22 Limited, Citibank NA, and Citicorp North America Inc.

23 THE COURT: Very good. Just give me two minutes,

24 please. Because the last argument I had myself all

25 scattered with that complaint everywhere. So if you would



1 just be patient with me.

2 Okay, I am now ready. This is -- Mr. Boccuzzi --  
3 how do you?

4 MR. BOCCUZZI: Boccuzzi. Boccuzzi, Your Honor.

5 THE COURT: This is your motion to dismiss.

6 MR. BOCCUZZI: Yes. Thank you, Your Honor. One  
7 thing. The docket number you said at the beginning, I'm not  
8 sure --

9 THE COURT: I said adversary proceeding 10-3545.  
10 Is that incorrect?

11 MR. BOCCUZZI: 10-05345.

12 THE COURT: Yeah. What happens is I left the zero  
13 off. Sometimes people leave the zero off.

14 MR. BOCCUZZI: Okay. And then I just misheard the  
15 numbers. Apologies.

16 THE COURT: Okay. I apologize. And I am glad you  
17 -- I am so glad you clarified it for the record. So this is  
18 Adversary Proceeding 10-05345.

19 MR. BOCCUZZI: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. BOCCUZZI: This is the motion to dismiss  
22 brought by the -- I'll call them the, when I refer to all  
23 three of them, the Citi defendants. But the complaint here  
24 is really two sets of claims; one by the trustee against  
25 Citigroup Global Markets Limited, and I'll try to just refer

1 to them as Citigroup Global Markets, and the other is a  
2 claim against Citibank and Citicorp. And they are both  
3 claims under Bankruptcy Code 550 as purported secondary  
4 transferees. I think it might make sense just for purposes  
5 of dividing it up to start with the claim against Citigroup  
6 Global Markets. That claim arises out of two purported  
7 secondary transfers totaling \$100 million that allegedly  
8 went from Madoff to the Fairfield Sentry fund and then on to  
9 Citi Group Global Markets. The trustee originally --

10 THE COURT: Excuse me for interrupting.

11 MR. BOCCUZZI: Yes.

12 THE COURT: And that is -- you are saying it was a  
13 swap, correct?

14 MR. BOCCUZZI: Yes, that involved a swap. I was  
15 going to give some of that background, Your Honor, just to  
16 set the table as it were. And that was exactly my next  
17 point. The claim was originally \$130 million. That was  
18 comprised of three different transfers, one in 2005 and then  
19 the ones that we're here about today in 2008. But the  
20 district court in 2013 -- and that's at 505 B.R. 135 --  
21 dismissed a \$30 million transfer as a result of the  
22 application of the 546(g) safe harbor. And that's the safe  
23 harbor that protects or covers transfers in connection with  
24 a swap agreement. And the swap agreement in this case --  
25 and it's discussed in that opinion -- is one that was

1 between Citigroup Global Markets and a fund that was named  
2 Auriga. And what Auriga wanted via the swap was to have  
3 leveraged exposure to the Fairfield fund. So the swap  
4 agreement provided that Citigroup Global Markets would pay  
5 or take money from Auriga -- from Auriga, yes, based on the  
6 performance of the Fairfield Sentry fund. Citigroup itself  
7 didn't want to have direct market exposure to the Fairfield  
8 fund. That's not the point of these transactions. It  
9 wanted to hedge that. So what it did was it bought shares  
10 in the corresponding amount of the swap. And so if Auriga  
11 wanted a return or money out of its swap, it would notify  
12 Citigroup Global Markets. Citigroup Global Markets would  
13 redeem the corresponding appropriate amount of shares from  
14 the Fairfield fund and pay that over to Auriga. So it was a  
15 very mechanical sort of process. Auriga says let's reduce  
16 the size of the swap, Citibank does the calculation --  
17 Citigroup Global Markets, excuse me -- and then redeems out.  
18 And two such redemptions happened in 2008, and they are the  
19 subject of the motion today and the current amended  
20 complaint from the trustee. One was in April of 2008 for  
21 \$60 million and one was in November of 2008 for \$40 million.

22 And our motion as to these claims -- I think I'll  
23 just discuss the grounds of that and then we can move on to  
24 the Citibank side of the complaint -- says that the  
25 complaint as to Citigroup Global Markets should be dismissed

1 in full. And what we're doing is basing it on the caselaw  
2 and the reasoning set out in the concurrent by Judge Menashi  
3 in the Citibank decision that went to the Second Circuit  
4 where he questioned the underpinnings of the so-called Ponzi  
5 scheme presumption --

6 THE COURT: But you're arguing a concurrence to  
7 me, not the majority ruling?

8 MR. BOCCUZZI: Right. The majority acknowledges  
9 that no one was challenging the Ponzi scheme presumption.  
10 It didn't bless or accept the Ponzi scheme presumption. And  
11 so, yes, it is a concurrence. So the concurrence cites, and  
12 we cite in our brief, other cases that point out some of the  
13 issues with the Ponzi scheme presumption. And an important  
14 one is that there is of course no mention of the Ponzi  
15 scheme presumption in the Bankruptcy Code. The Bankruptcy  
16 Code trains on in Section 548 as well as the other avoidance  
17 provisions the transfer itself; what was the intent? And  
18 now we're talking about actual intent to hinder, delay,  
19 defraud of the transfer at issue, and it doesn't look to  
20 broader issues related to how the debtor was run or managed  
21 or if it was a Ponzi scheme. The Bankruptcy Code doesn't  
22 give out special rules for fraudulent conveyances in the  
23 context of a Ponzi scheme. And here of course we are  
24 dealing with primary transfers and alleged primary  
25 transfers, because we also raise a tracing point as to the

1 April 2008 transfer. But allegedly starting with Fairfield  
2 -- from Madoff to Fairfield. And of course Fairfield was a  
3 net loser. So we're not talking about illegitimate false  
4 profits.

5 Your Honor in the Goodman case earlier this year  
6 said of course there's no reason not to apply the Ponzi  
7 scheme presumption in the context of a recipient of false  
8 profits, fictitious profits. We don't have that here in  
9 this case. We're dealing with the return of principal. And  
10 so what we have then is at most a preference among creditors  
11 as opposed to the squirreling away of assets to get them out  
12 of the hands of creditors and keep them under some sort of  
13 indirect or other dominion or control of the original  
14 debtor.

15 And so we would say if you then look back to the  
16 sort of usual badges of fraud analysis and you look and you  
17 see that the transfers to Fairfield did not remain under any  
18 sort of control with Madoff, there's no argument given that  
19 it was just a return of principal, that there was inadequate  
20 consideration. And so you just have a situation where,  
21 again, they need to plead actual intent to hinder, delay,  
22 defraud as to these transfers. And we just don't think that  
23 the usual resort to the Ponzi scheme presumption should do  
24 the trick.

25 And then as to the tracing point, our arguments as

1 to tracing would not dispose of the entire case against  
2 Citigroup Global Markets. Here we are really talking about  
3 the \$60 million transfer in April of 2008 from Fairfield to  
4 Citi Global Markets. But again, if we look at the complaint  
5 and we look at things that I believe Your Honor could take  
6 judicial notice of, you see that the \$60 million that came  
7 in April of 2008. There was no recent transfer by Madoff to  
8 Fairfield in that amount. You have to go back more than  
9 three months to mid-January of 2008. At that time, there is  
10 a transfer of \$70 million. But in between that transfer and  
11 the transfer to Citi from Fairfield, you have at least \$141  
12 million in other transfers going out from Fairfield. And we  
13 just think given that it's just not plausible to say based  
14 on that math that you can say the \$60 million -- or there's  
15 a plausible case here that the \$60 million was in fact money  
16 that came from Madoff as opposed to other subscribers into  
17 the Fairfield funds.

18 So those are the two arguments that we think  
19 warrant complete or at least partial dismissal of the claim  
20 against CGML. And I'm happy either to take any questions,  
21 Your Honor, or move on to the Citibank side unless you want  
22 to go one at a time and have the trustee respond on  
23 Citigroup Global Markets.

24 THE COURT: Go to the Citibank argument.

25 MR. BOCCUZZI: Okay. On the Citibank side, what

1 we are dealing with here is a loan, a loan made in 2005 by  
2 Citibank to what became known as the Prime Fund. That was  
3 one of several funds managed by the Tremont Group and that  
4 invested with Madoff.

5 In March of 2008, Tremonte and Prime, finding an  
6 alternative lender, terminated that loan. So they  
7 terminated the loan, and they paid back the \$300 million.  
8 In the period of the life of the loan, between June or so of  
9 2005 and March 2008, Citibank received regularly scheduled  
10 interest payments in the amount of around I think \$40  
11 million. And the trustee is seeking to claw back under  
12 550(a) those interest payments as well as the \$300 million  
13 repayment.

14 We think that this claim should be dismissed. And  
15 as to this -- this is point two in our brief -- we think the  
16 Court can dismiss it because the sort of (indiscernible)  
17 plus ultra fraudulent conveyance is depletion of the estate.  
18 And if you look at what happened here -- and that's both in  
19 the complaint that's against us, the incorporated by  
20 reference complaint against Tremont, as well as a related  
21 complaint involving ABN AMRO is that that repayment to us,  
22 again, which was driven by Tremont and not Citi, was part of  
23 one integrated transaction where \$300 million came out of  
24 the Madoff estate, but then a corresponding greater amount  
25 went right back into the Madoff estate through another

1 Tremont-managed fund.

2 And so our position is that -- and we cite cases  
3 to this effect and I would refer Your Honor to the Ivy case  
4 involving the entities that were buying steel. When you  
5 have one integrated transaction like that where the -- at  
6 the end of the day the debtor is left not depleted and in  
7 fact having more money than the -- it's really not the  
8 proper subject of a fraudulent conveyance/550 claim because  
9 you don't have that initial depletion of the estate.

10 Again, the caselaw that we cite, the Gredd case  
11 and other cases focuses on is their harm to the debtor that  
12 resulted from the transfer. And given these facts that are  
13 in the complaint and are judicially noticeable by Your  
14 Honor, we think they're not.

15 And there's also -- that argument we think should  
16 dispose of the entirety of the claim. There's also a  
17 tracing argument again as with the portion of the claim  
18 against Citigroup Global Markets. And in the context here,  
19 we are talking about the attempt to claw back the interest  
20 payments that were made to Citibank over the life of the  
21 loan.

22 So, for example, there during the last 12 months  
23 of 2005 when the allegation is that Citi received about \$4.4  
24 million in interest from the Prime fund, there were no  
25 transfers in that period from Madoff to Prime. And again in



1 2007 when there's about \$18 million in interest flowing to  
2 Citi, you don't see any initial transfers going on from the  
3 debtor to Prime. So we think, again, in the absence of  
4 that, there's just no plausible allegation of tracing. And  
5 at the very least if Your Honor doesn't dismiss the entire  
6 claim, those claims as to interest payments should be  
7 dismissed for failure to plausibly allege an initial  
8 transfer that passed on to us.

9 THE COURT: Very good. Ms. Charlemagne?

10 MS. CHARLEMAGNE: Thanks, Your Honor. Again,  
11 Chardaie Charlamagne with Baker Hostetler on behalf of the  
12 trustee.

13 Your Honor, defendants advance three main  
14 arguments in their motion to dismiss. First, they argue  
15 that the trustee has not alleged that BLMIS made the initial  
16 transfers at issue here with the requisite intent to defraud  
17 under Section 548(a)(1)(A) because, according to them, the  
18 Ponzi scheme presumption should not establish such intent.

19 Second, they argue that there was no depletion of  
20 the estate because someone else later invested other funds  
21 in the Ponzi scheme through a separate account.

22 And third, they argue that some of the subsequent  
23 transfers they received did not contain stolen customer  
24 property.

25 These arguments are without merit. The trustee

1 has alleged that the specific transfers at issue here were  
2 made with actual intent to hinder, delay, or defraud as  
3 required under Section 548(a)(1)(A) both by way of the Ponzi  
4 scheme presumption and through badges of fraud. This and  
5 other courts have repeatedly upheld the Ponzi scheme  
6 presumption, found the same allegations made here sufficient  
7 to satisfy Section 548(a)(1)(A), and repeatedly rejected  
8 defendant's precise argument regarding customer property.  
9 Defendants cite no binding precedent or authority in support  
10 of their suggestion that the Court set aside its rulings in  
11 this liquidation or well-established principles of law such  
12 as the applicability of the Ponzi scheme presumption to a  
13 Section 548(a)(1)(A) claim.

14 Instead, defendants grasps onto dicta and a  
15 concurrence by Judge Menashi in the Citibank appeal arguing  
16 without supporting authority that the Ponzi scheme  
17 presumption should be set aside. This reliance on Judge  
18 Menashi's concurrence is misplaced as I will discuss  
19 shortly.

20 Defendant's argument provide no legal basis upon  
21 which this Court may dismiss the trustee's claims based on  
22 the facts in this case. I will address each of defendant's  
23 argument in turn.

24 I would like to first take a few moments to talk  
25 about why the trustee's allegations satisfies Section

1 548(a)(1)(A). Section 548(a)(1)(A) allows for the avoidance  
2 of transfers made with actual intent to hinder, delay, or  
3 defraud creditors. Defendants argue that the trustee has  
4 not alleged facts relating to the specific initial transfers  
5 he seeks to avoid here. Defendants are wrong.

6 The trustee has alleged that BLMIS made the  
7 specific transfers at issue here to Prime Fund and Sentry  
8 with actual intent to hinder, delay, or defraud its  
9 creditors. Specifically, the trustee alleges the following  
10 facts.

11 The trustee alleges that BLMIS' IA business  
12 operated as a fraud and Ponzi. This is alleged at  
13 Paragraphs 15, 62, and 66 of the complaint. The trustee  
14 alleges that BLMIS did not purchase or sell securities for  
15 its IA business customers. This is alleged at Paragraph 16  
16 of the complaint. Instead, BLMIS created false, backdated  
17 trades for its IA business customer accounts beginning in  
18 the early 1970s. This is alleged at Paragraph 17 of the  
19 complaint. Thus, the IA business had no legitimate business  
20 operations and produced no profits or earnings. This is  
21 alleged at Paragraphs 62 to 65 of the complaint. And the  
22 trustee also alleges that BLMIS comingled all of its  
23 customer funds into a single account. This account was used  
24 to distribute funds to other customers, to make  
25 distributions and payments for other customers, to benefit

1 Madoff and his family personally, and to prop up Madoff's  
2 proprietary trading business. This is alleged at Paragraph  
3 67 of the complaint.

4 In other words, BLMIS robbed Peter to pay Paul  
5 using funds received from one set of customers to pay other  
6 customers with no legitimate business operations or trading  
7 taking place.

8 These allegations plausibly establish that BLMIS  
9 operated a Ponzi scheme through its IA business. The  
10 trustee also alleges facts that plausibly establish that  
11 BLMIS made the initial transfers at issue here to Sentry and  
12 Prime Fund in furtherance of that Ponzi scheme.  
13 Specifically the trustee alleges the following facts.

14 The trustee alleges that Sentry and Prime Fund  
15 were IA business customers who invested substantially all of  
16 their assets with BLMIS. This is alleged at Paragraphs 5,  
17 53, 172, and 181 of the complaint. The trustee alleges that  
18 BLMIS comingled all funds it received from Prime Fund and  
19 Sentry with other customer funds in a single BLMIS account  
20 which it used to maintain the Ponzi. The comingled funds  
21 were not used to trade securities, but were used to make  
22 distributions or payments to other customers. Again, this  
23 is alleged at Paragraph 67 of the complaint.

24 The trustee alleges that the initial transfers at  
25 issue here were made by BLMIS to Sentry and Prime Fund as IA

1 business customers. This is alleged at Paragraphs 3 through  
2 4, 44 through 45, 164, and 177 of the complaint. And the  
3 trustee alleges that those transfers to Prime Fund and  
4 Sentry were not comprised of proceeds of securities  
5 transactions. Rather, the initial transfers to Sentry and  
6 Prime Fund which are at issue here were comprised of  
7 customer property stolen from other customers. This is  
8 alleged at Paragraphs 1, 67, 164, and 177 of the complaint.  
9 These allegations are sufficient to state a claim under  
10 Section 548(a)(1)(A) with respect to the initial transfers  
11 at issue here both by way of the Ponzi scheme presumption  
12 and under the badges of fraud test.

13 I would like to now address Defendant's arguments  
14 regarding the Ponzi scheme presumption. This Court and  
15 others inside and outside of this district have all held  
16 that allegations such as those just mentioned are sufficient  
17 to trigger the Ponzi scheme presumption. As an initial  
18 matter, defendant's argument that the Ponzi scheme  
19 presumption is inconsistent with Section 548(a)(1)(A) is  
20 without support or authority. District courts within this  
21 circuit have unanimously applied the Ponzi scheme  
22 presumption as a matter of law to establish a debtor's  
23 fraudulent intent as required under Section 548(a)(1)(A).  
24 Every circuit court to consider the issue has similarly  
25 applied the Ponzi scheme presumption as a matter of law. In

1 fact, defendants were unable to cite a single case anywhere  
2 in this nation holding that the Ponzi scheme presumption is  
3 inconsistent with the plain language of Section  
4 548(a)(1)(A). Instead, defendants base their argument that  
5 the Ponzi scheme presumption is overbroad and inconsistent  
6 with the text of Section 548(a)(1)(A) on dicta and a  
7 concurring opinion. But as the district court recently  
8 held, notwithstanding Judge Menashi's concurrence, the Ponzi  
9 scheme presumption remains the law of the circuit. This is  
10 in Sage Realty at 2022 WL 1125643.

11 Defendants take issue with the Ponzi scheme  
12 presumption as a means of establishing fraudulent intent,  
13 arguing that it is overbroad, inconsistent with the plain  
14 language of 548(a)(1)(A), and that the presumption is not in  
15 the Bankruptcy Code.

16 First, the Ponzi scheme presumption is not  
17 overbroad. Defendants argue that the presumption is  
18 overbroad because it allows the trustee to establish  
19 fraudulent intent for any and every transfer BLMIS made.  
20 But as just discussed and as set forth in our papers, the  
21 Ponzi scheme presumption establishes fraudulent intent for  
22 the specific initial transfers at issue here because those  
23 transfers were made in furtherance of BLMIS' Ponzi scheme.  
24 This is because with a Ponzi scheme, the investor pool is a  
25 limited resource that will eventually run dry. And as is

1 the case with all Ponzi schemes, Madoff, the Ponzi scheme  
2 operator, must have known all along from the very nature of  
3 his activities that investors at the end of the line would  
4 lose their money. Thus, the only possible inference is that  
5 the debtor here, Madoff, had the intent to hinder, delay, or  
6 defraud future creditors because he must have known that  
7 future creditors would not be paid.

8 Second, defendants argue that the Ponzi scheme  
9 presumption is inconsistent with the plain language of  
10 Section 548(a)(1)(A) simply because the presumption is not  
11 explicitly defined in the Bankruptcy Code.

12 However, judicially-created presumptions are  
13 regularly implemented by trial and appellate courts.  
14 Indeed, presumptions typically serve to assist courts in  
15 managing circumstances in which direct proof for one reason  
16 or another is rendered difficult. And courts regularly  
17 accept judicially-created presumptions arising out of  
18 considerations of fairness, public policy, probability, as  
19 well as judicial economy.

20 In Basic, Inc. v. Levinson, 485 U.S. 224, the  
21 Supreme Court upheld a judicially-created presumption of  
22 reliance based on the fraud on the market theory in a  
23 securities case and specifically held that the presumption  
24 was supported by common sense and probability.

25 Thus, in direct contradiction to Defendant's

1 arguments, the Ponzi scheme presumption is not overbroad, it  
2 is not inconsistent with the plain language of Section  
3 548(a)(1)(A). The presumption is well-founded and supported  
4 by common sense and probability. Again, the only possible  
5 inference here is that Madoff intended to hinder, delay, or  
6 defraud future creditors because he must have known that  
7 future creditors would not be paid by the very nature of the  
8 Ponzi scheme he created. The Ponzi scheme presumption  
9 presumes actual intent only where the transfers were made in  
10 furtherance of the Ponzi scheme, as is the case with the  
11 initial transfers at issue here.

12 And as just mentioned, the trustee alleges with  
13 particularity that Madoff operated a Ponzi and that the  
14 initial transfers to Prime Fund and Sentry were made in  
15 furtherance of that Ponzi scheme. This is sufficient to  
16 allege fraudulent intent under the Ponzi scheme presumption.

17 Almost all the cases cited by the defendants in  
18 support of their argument to sidestep the Ponzi scheme  
19 presumption are constructive fraud cases. And in the case  
20 of Finn v. Alliance Bank, the court's ruling was based on  
21 Minnesota state law which directly contradicts New York law  
22 and is not binding in this district. Defendants' reliance  
23 on other cases is similarly misplaced. Lustig v. Weiss,  
24 (indiscernible), and In re Churchill Mortgage Investment  
25 Corp. were cases that focused on whether the presumption



1 establishes a lack of reasonably equivalent value as an  
2 element of a constructive fraudulent conveyance claim.  
3 Reasonably equivalent value is not an element of Section  
4 548(a)(1)(A).

5 Defendants' reliance on Sharpe is also misplaced.  
6 The Second Circuit has held Sharpe inapplicable to this  
7 civil proceeding. Sharpe involved a loan to the debtor and  
8 no Ponzi scheme. And Sharpe actually supports the trustee's  
9 position here that the Ponzi scheme presumption is  
10 appropriate because, unlike the initial transfer in Sharpe,  
11 BLMIS made the initial transfers here in furtherance of its  
12 fraud.

13 Moreover, Sharpe didn't dismiss an actual fraud  
14 claim because it would result in an impermissible choice  
15 between creditors that should be considered a preference.  
16 It dismissed that claim because it found that the initial  
17 transfer was not made in furtherance to or in connection  
18 with the debtor's fraud.

19 Even if the court were to find for the first time  
20 in this district that the Ponzi scheme presumption is  
21 inapplicable to a Section 548(a)(1)(A) claim, contrary to  
22 defendant's contentions, the trustee alleges multiple badges  
23 of fraud which are sufficient to support a finding of  
24 fraudulent intent with respect to the initial transfers at  
25 issue here. Specifically the trustee alleges the following.

1           The trustee alleges that BLMIS' IA business was  
2           not legitimate; it was a fraud and a Ponzi scheme. And that  
3           is alleged at Paragraphs 15 through 17, 62, and 66.

4           The trustee alleges that BLMIS concealed facts and  
5           made false representations about the IA business. That is  
6           alleged at Paragraphs 59 through 60, 64 through 65.

7           The trustee also alleges that BLMIS comingled all  
8           customer funds into a single account. This is alleged at  
9           Paragraph 67. And the trustee alleges that BLMIS misused  
10          investor funds and created false financial statements. This  
11          is alleged at Paragraph 17, 59 through 60, and 64 through  
12          65.

13          These allegations have already been held to be  
14          sufficient to support a badges of fraud theory of fraudulent  
15          intent. This can be found in *SIPC v. BLMIS*, 528 F.Supp.3d  
16          219 (2021). There, the court found that badges of fraud  
17          such as those just discussed were sufficient to establish  
18          fraudulent intent under a badges of fraud theory.

19          In conclusion, the trustee adequately alleges  
20          fraudulent intent for the specific transfers at issue here  
21          under either the Ponzi scheme presumption or a badges of  
22          fraud theory.

23          Next I would like to address defendant's depletion  
24          of the estate arguments.

25          Defendants challenge the trustee's power to avoid

1 a \$301 million transfer from Prime Fund to the defendants.  
2 Their reasoning is that they were somehow parties to an  
3 integrated transaction that did not deplete the estate.  
4 This argument has no legal or factual basis. Before I  
5 discuss the lack of any factual basis for defendant's  
6 argument, I would like to discuss the fatal flaws in  
7 defendant's legal argument.

8 Even if defendants were able to establish that  
9 they reinvested the customer property they received into  
10 another feeder fund, which they cannot, their argument would  
11 still fail because the bankruptcy court has already rejected  
12 defendant's reasoning in Picard v. Lustig at 568 B.R. 481.  
13 This is not the first time this argument is before the  
14 court. This is not even the first time this argument is  
15 before the court in this very case.

16 Although the bankruptcy court did not decide this  
17 issue the last time defendants raised it, at the hearing on  
18 a previous motion, the bankruptcy court questioned why  
19 defendant's depletion of the estate argument was not  
20 foreclosed by the bankruptcy court's decision in Picard v.  
21 Lustig. Defendants were unable to distinguish Lustig then  
22 as can be seen in the hearing transcript, and they are not  
23 able to distinguish is not, nor do they try to in their  
24 motion papers.

25 Defendants did not even attempt to rebut the

1 trustee's opposition brief concerning Lustig, and the Lustig  
2 defendants were actually better situated to make this  
3 argument because, unlike Citibank, the Lustig defendants  
4 actually reinvested funds back into the BLMIS estate via a  
5 different customer account. The Lustig defendants withdrew  
6 fictitious profits from one BLMIS customer account and later  
7 reinvested those funds into another BLMIS account through a  
8 feeder fund.

9 In Lustig, the court declined to offset fictitious  
10 profits in one BLMIS account against losses in a separate  
11 BLMIS account, reasoning that the reinvestment is still a  
12 separate transaction governed by whatever account agreements  
13 the funds had with BLMIS.

14 This is the same situation here. Defendants are  
15 trying to offset the transfers they received from Prime  
16 Fund, a net winner, against Broad Market, a net loser.  
17 Moreover, if the court found in Lustig that the same party  
18 who took its money out and reinvested it back into Madoff  
19 was unable to offset these transfers against each other, why  
20 would Citibank be allowed to get a credit for another  
21 party's investment? They should not.

22 Citibank and Citicorp are attempting to collapse  
23 transactions across accounts and co-op this value. The  
24 deposits that Citibank is attempting to co-op for themselves  
25 have already been applied to the deposits in the Broad

1 Market account.

2 Additionally, as noted in Lustig, Defendants'  
3 proposition flies in the face of established Second Circuit  
4 law on net equity in this case. In the Second Circuit's  
5 decision upholding the trustee's net investment method of  
6 determining net equity, the court held that each customer's  
7 net equity should be calculated by crediting the amount of  
8 cash deposited by the customer into his or her BLMIS account  
9 less any amounts withdrawn from it.

10 Here, the deposits and withdrawals in Broad  
11 Market's account form the basis of this account's net equity  
12 just as the deposits and withdrawals in Prime Fund's BLMIS  
13 account form the basis of this account's net equity. By  
14 trying to combine transfers in unrelated transactions,  
15 Defendants are requesting a second round of credits for the  
16 deposits in Broad Market's account. This result would be  
17 inequitable to all BLMIS customers, but --

18 THE COURT: Ms. Charlemagne, I'm sorry to  
19 interrupt you, but I've got to interrupt you. Because I  
20 don't remember this issue being addressed, and you said it  
21 was. In Lustig?

22 MS. CHARLEMAGNE: It wasn't -- yes, in Lustig the  
23 issue, the rationale was addressed in Lustig. So in Lustig,  
24 they were also trying to do a similar thing. They were  
25 trying to offset fictitious profits in one BLMIS account

1 against losses in a separate --

2 THE COURT: But did you have another case rather  
3 than Lustig?

4 MS. CHARLEMAGNE: No. Lustig was the only one I  
5 referenced. I did reference that the Defendants had made  
6 this very argument in this case before and even --

7 THE COURT: Okay. I did hear that, but somehow I  
8 thought I was missing a cite.

9 MS. CHARLEMAGNE: No.

10 THE COURT: I heard Lustig and I heard maybe  
11 argument before. Okay. Thank you. You clarified my brain.  
12 Okay.

13 MS. CHARLEMAGNE: All right. So I am going back  
14 to talking about the defendants and the net equity decision.

15 THE COURT: Okay.

16 MS. CHARLEMAGNE: So here the deposits and  
17 withdrawals in Broad Market's account form the basis of this  
18 account's net equity just as the deposits in Prime Funds  
19 form the basis of that account's net equity. By trying to  
20 combine the transfers, the defendants are requesting a  
21 second round of credits. And this would be inequitable to  
22 all BLMIS customers.

23 Defendants also entirely missed the point the  
24 trustee makes about how the net equity calculations affected  
25 the Tremont settlement agreement. The trustee is not

1 arguing that Citibank is bound by the settlement. Rather,  
2 the settlement accurately reflects the facts of the deposits  
3 that defendants are now attempting to co-op for themselves.

4 Having discussed the legal deficiencies of  
5 defendants arguments, I will now address why defendants'  
6 argument has no factual basis.

7 Defendants are wrong on the law, but they are also  
8 wrong on the facts. Defendants' arguments depends on this  
9 Court exercising its equitable powers to collapse multiple,  
10 unrelated transactions to find that there was an integrated  
11 round trip transaction. There is no basis for this  
12 argument. No funds went out and came back in from Citibank  
13 or Prime Fund. They only came out.

14 As set forth in Exhibit E to the amended complaint  
15 at ECF 214, Prime Fund did not return any of the \$475  
16 million it withdrew from its BLMIS IA account on March 25th,  
17 2008. In fact, Prime Fund did not make any deposits to its  
18 BLMIS IA account after receiving the initial transfers that  
19 Defendants' claim did not deplete the estate.

20 The facts make it clear that the \$301 million  
21 received by defendants from Prime Fund is an interest of the  
22 debtor and property that the trustee is permitted to avoid  
23 and recover.

24 As background, the trustee's claims against  
25 defendants arise from the receipt of subsequent transfers of

1 stolen customer property from Prime Fund, which held Account  
2 Number 1C1260 at BLMIS. The facts of this transaction are  
3 simple; defendants received \$301 million from Prime Fund.  
4 This \$301 million transfer from Prime Fund to Citibank and  
5 Citicorp never returned to BLMIS or the BLMIS estate. Had  
6 Prime Fund not received the initial transfer of \$475 million  
7 from BLMIS, it would have become part of the customer  
8 property fund available to distribute pro rata to all  
9 customers. This fact alone is sufficient to defeat  
10 defendants depletion of the estate argument.

11 Indeed, in *Bear Stearns v. Gredd*, 275 B.R. 190, a  
12 case heavily relied upon by the defendants, the court  
13 concluded that Section 548(a)(1)(A) only permits a trustee  
14 to avoid a transfer of an interest of the debtor and  
15 property when but for the transfer such property interest  
16 would have been available to at least one of the debtor's  
17 creditors. This is precisely the case here. But for the  
18 \$475 million initial transfer from BLMIS to Prime Fund, \$475  
19 million, including the \$301 million subsequently transferred  
20 to defendants from Prime Fund would have been available to  
21 at least one of BLMIS' creditors.

22 This brings me to the next fundamental point  
23 regarding defendants' depletion argument. Section  
24 548(a)(1)(A) of the Bankruptcy Code provides that a trustee  
25 may avoid any transfer of an interest of the debtor in



1 property that was made or incurred within one year before  
2 the date of filing if the debtor made such a transfer with  
3 actual intent to hinder, delay, or defraud.

4 Diminution or depletion of the estate arguments  
5 are typically concerned with how one defines an interest of  
6 the debtor. In other words, the issue discussed in Bear  
7 Stearns was whether an interest of the debtor in property  
8 referred only to property that would have been available for  
9 the benefit of the debtor's creditors and/or property that  
10 would have been part of the estate had it not been  
11 transferred before the commencement of the bankruptcy  
12 proceedings.

13 In Bear Stearns, the transfers sought by the  
14 trustee were held to not be an interest of the debtor in  
15 property because a federal law made it so that those funds  
16 were never part of and could never be a part of the estate.  
17 And thus, those funds were never available to satisfy any  
18 obligations of the debtor.

19 Here, defendants cannot and do not argue that the  
20 transfer at issue was not in interest of the debtor in  
21 property because there is no question that the \$301 million  
22 they received would have been available for the benefit of  
23 the debtor's creditors and was property that would have been  
24 part of the estate had it not been transferred before the  
25 commencement of the bankruptcy proceeding. This fact alone

1 defeats defendant's depletion of the estate argument.

2 Additionally, the district court has already held  
3 in Bear Stearns that depletion of the estate is not an  
4 element of a Section 548(a)(1)(A) claim. It found that  
5 defendants can raise this issue as an affirmative defense  
6 and set forth three elements that defendants must plead and  
7 prove to establish the defense. Defendants cannot, nor do  
8 they even try to establish any of these elements. Rather,  
9 rather than helping defendants, Bear Stearns further  
10 bolsters the trustee's argument that these transfers to  
11 Citibank and Citicorp depleted the estate.

12 The Southern District in Bear Stearns set forth a  
13 three-element affirmative defense that the transferee bears  
14 the burden of pleading and proving to establish that a  
15 transfer did not deplete the estate. Specifically, the  
16 transferee must prove that the transfer did not reduce the  
17 (indiscernible) that would have been available to the  
18 creditors. It didn't hinder, delay, or defraud any  
19 creditors, and it did not have any other adverse impact on  
20 any creditor or creditors generally.

21 The Bear Stearns court noted that if the  
22 transferee succeeds in successfully making this affirmative  
23 defense, the burden then shifts to the trustee to rebut the  
24 transferee's showing. Whether the transferee has sustained  
25 his ultimate burden of proof will be decided on the entire

1 record before the court. Defendant does not address the  
2 elements laid out by Bear Stearns, much less demonstrate  
3 that they have established on the face of the complaint as  
4 would be required to prevail on an affirmative defense on a  
5 motion to dismiss.

6 The Bear Stearns court explained that creditors --

7 THE COURT: Ms. Charlemagne, do you have all of  
8 this in your arguments already, or are you just reading what  
9 you gave me?

10 MS. CHARLEMAGNE: I do have a lot of it already in  
11 my argument. I can streamline it a bit.

12 THE COURT: Thank you. I would prefer for  
13 everybody, if you've said it once, you don't need to say it  
14 twice. But if you want to add, I'd like for you to add.  
15 Not just give me what you've already given me.

16 MS. CHARLEMAGNE: Okay. I think most of these  
17 arguments are in our papers.

18 THE COURT: They're mostly in your papers. And I  
19 let you go on for a long time.

20 MS. CHARLEMAGNE: You did. And I appreciate that.  
21 Okay. So I think what I'll do is I'll just quickly  
22 distinguish Pereira, which is a case that they strongly rely  
23 on for their depletion arguments. And then for the customer  
24 property argument that they make, I will very briefly touch  
25 on that and rest on our papers.

1 THE COURT: Thank you.

2 MS. CHARLEMAGNE: And so for Pereira, I just  
3 wanted to clarify that in Pereira, Pereira was in a  
4 completely different procedural and factual posture than  
5 this case here. It was a full record at summary judgement  
6 and the defendants have not shown a single case successfully  
7 applying this collapsing doctrine to defeat a Section  
8 548(a)(1)(A) claim.

9 In Pereira, the agreements cross-referenced each  
10 other. Both agreements were expressly conditioned on the  
11 contemporaneous closing of the other transaction and payment  
12 on both agreements was accomplished with a single wire  
13 transfer.

14 Here, the defendants did not even explain which  
15 agreements formed the supposedly integrated transactions.  
16 They attempt to utilize an unrelated party's subsequent  
17 transfer which held a wholly different BLMIS account as a  
18 reason by BLMIS' transfers to Prime Fund did not deplete the  
19 estate.

20 So defendants asked this Court to collapse  
21 unrelated transactions between separate parties and to  
22 ignore economic realities of fraudulent transfers in a plea  
23 for equitable relief that has no basis in law or fact.

24 And for the customer property, I don't have  
25 anything new to say. So, Your Honor, I will just rest on

1 our papers for the argument there.

2 THE COURT: Thank you very much. Any quick  
3 rebuttal, Mr. Boccuzzi?

4 MR. BOCCUZZI: Yes, if I might, Your Honor. Just  
5 three points.

6 THE COURT: You know, I don't mind any points.  
7 Just don't repeat what you've given me.

8 MR. BOCCUZZI: I'm not going to repeat. I'll just  
9 -- it will be a true reply in terms of points raised by Ms.  
10 Charlemagne.

11 Number one, on the Ponzi scheme presumption, the  
12 red flags analysis that we heard from Your Honor was nothing  
13 more than the allegations as to why Madoff was a Ponzi  
14 scheme. We are not, as in many of the cases that the  
15 trustee cites, saying that the Ponzi scheme presumption  
16 shouldn't apply because there was no Ponzi scheme. We agree  
17 there was a Ponzi scheme. What we're saying is that  
18 accepting that there was a Ponzi Scheme shouldn't change the  
19 rules of the game. And you still have to go transfer-by-  
20 transfer. And we cite cases about the Ponzi scheme  
21 transaction.

22 Going to these points on Page 15 of our opening  
23 brief and also in the In re Churchill case there is the  
24 quote, "The fact that the debtor's enterprise as a totality  
25 is operated at a loss or in a manner that is fraudulent does

1 not render actually or constructively fraudulent a  
2 particular transaction which in and of itself is not  
3 fraudulent in any respect." And we would say the return of  
4 principal is that.

5 And then quickly on Lustig. On Lustig, the  
6 argument is really based on what the trustee did vis-à-vis  
7 certain customers as part of a settlement to which we were  
8 not a party. So that's not binding on us. And importantly,  
9 I think the analysis is exactly backwards. I don't think  
10 we're arguing anything that would disrupt the net equity  
11 rule. There's really two sides to the coin here. What is  
12 what is the estate comprised of and what can the estate pull  
13 back. And number two with the net equity, how do you divide  
14 that up among customers, of which we are not, which also  
15 distinguishes from the Lustig case.

16 And so we are saying here if you look at the pie  
17 that was the debtors estate as it were and you look at these  
18 transactions, there was no depletion of the estate given  
19 that when the money came out, it went back in and then some  
20 back into the estate. And so without that depletion, you  
21 don't have a 548 claim.

22 THE COURT: Anything else either one of you wish  
23 to add?

24 MS. CHARLEMAGNE: Nothing else from the trustee,  
25 Your Honor.

1 THE COURT: Very good. You will receive a written  
2 opinion.

3 The Court needs to take about a five-minute break.

4 (Recess)

5 THE COURT: Very good. We are back on the record.  
6 If you would just give me a moment.

7 And now we are at 11-02572, Picard v. Korea  
8 Exchange Bank. State your name and affiliation.

9 MR. CIRILLO: Good afternoon, Your Honor.  
10 Richard Cirillo. I guess the affiliation is Cirillo Law  
11 Office. And I am appearing for the defendant, Korea  
12 Exchange Bank.

13 MR. FISH: Good afternoon, Your Honor. This is  
14 Eric Fish at Baker Hostetler on behalf of the Trustee.

15 THE COURT: Very good. Excuse me, let me get my -  
16 - oh, that's the next one. Here we go. I have it now. And  
17 it's your -- Mr. Cirillo, I believe you are the one on the  
18 motion to dismiss.

19 MR. CIRILLO: I do indeed. And I appreciate Your  
20 Honor's patience in waiting so long to get to my case.

21 THE COURT: Well, you notice I got a little  
22 impatient just a minute ago when they were repeating what  
23 they had already given me.

24 MR. CIRILLO: Well, on one occasion Your Honor  
25 said that you were prepared to sit all day and therefore had

1 brought snacks. I hope you had brought snacks today.

2 THE COURT: I did. I did. I did.

3 MR. CIRILLO: Okay. Well, I will proceed, Your  
4 Honor, if I may.

5 THE COURT: Please.

6 MR. CIRILLO: Korea Exchange Bank is a Korean  
7 bank, and it was trustee, as alleged in the complaint, of  
8 two Korean investment trusts. The complaint does not allege  
9 that KEB -- and I'll call Korea Exchange Bank KEB -- does  
10 not allege it conducted any activities in the United States  
11 in connection with Fairfield's shares.

12 I would like to cover three topics. One is  
13 customer property, the second is the Fairfield complaint,  
14 and the third is personal jurisdiction. And we'll be happy  
15 to rest on the papers for our 546(e) position.

16 I have read carefully all the Court's decisions in  
17 other subsequent transfer cases, and I am arguing this  
18 motion because I believe the KEB complaint and the arguments  
19 we are proposing to Your Honor are different from what has  
20 been presented before. And those different arguments are  
21 what I believe deserve dismissal of the KEB complaint in all  
22 or in part either with prejudice or with leave to amend.

23 The first issue I would like to address is the  
24 failure of the KEB complaint to allege that KEB received any  
25 customer property. I think it's unquestioned that an



1 essential element of the Plaintiff's claim is that the  
2 defendant actually did receive customer property. If the  
3 plaintiff does not allege that factually and plausibly the  
4 complaint fails.

5 This complaint alleges in Exhibit B that -- and I  
6 know everyone else is calling it BLMIS. I've always for 14  
7 years called it BLMIS. And with Your Honor's permission I  
8 would like to not have to retract my mind. So absent  
9 objection, I will call it BLMIS here.

10 THE COURT: Mr. Fish, do you object?

11 MR. FISH: I have no objection as long as I can  
12 call it BLMIS as I have been doing for the past 13 years or  
13 so.

14 THE COURT: Okay.

15 MR. CIRILLO: Okay. Well, I have a year on you,  
16 so I appreciate your concession.

17 THE COURT: Okay. Mr. Cirillo.

18 MR. CIRILLO: Yes. The complaint alleges --

19 THE COURT: Just so you know, for the transcriber  
20 of this, would you please just say BLMIS when you're doing  
21 it? I mean not you, the transcriber. I'm giving that  
22 message to the person transcribing this. Okay.

23 MR. CIRILLO: Good, good.

24 The complaint alleges in Exhibit B that BLMIS  
25 transferred \$3 billion to Fairfield Sentry. In Exhibit C --

1 and it alleges that in Exhibits C or CD and so forth to the  
2 subsequent transfer complaints before Your Honor, they  
3 alleged collectively that Fairfield transferred out \$5  
4 billion. The complaint does not in fact say that Fairfield  
5 had no source of money other than BLMIS. And obviously if  
6 it paid out \$2 billion more than it got from BLMIS, it did  
7 have another substantial source of money.

8 The exhibits in the subsequent transfer cases  
9 except other than this one against KEB are before the court  
10 and part of this case, and they need to be considered in  
11 evaluating whether this complaint alleges the receipt of  
12 customer property.

13 The first reason is, as the Court correctly held,  
14 all the subsequent transfer actions are part of the same  
15 case. In doing so, the Court cited Judge Fitzsimmons'  
16 decision in In re In re Geiger, 446 B.R. 670 (Bankr. E.D.  
17 Pa. 2010).

18 The second reason they are before the Court and in  
19 this case are that the exhibits in each of the subsequent  
20 transfer complaints are judicial admissions in the same case  
21 and are binding on the plaintiff. The plaintiff cannot  
22 escape or disavow those admissions. And for that, I would  
23 cite Guadagno v. Wallack Ader Levithan Associates, 950 F.  
24 Supp. 1258 (S.D.N.Y. 1997), which in turn cites a Seventh  
25 Circuit decision.

1           The third reason is that the court may take  
2       judicial notice of those exhibits in the other subsequent  
3       transfer cases and what the plaintiff says in those  
4       exhibits. The plaintiff admitted that judicial reference  
5       may be taken of other complaints in the case in his  
6       arguments about incorporating the Fairfield insider  
7       complaint.

8           Therefore, the plaintiff has alleged that  
9       Fairfield paid out money that did not come from BLMIS and  
10      therefore is not customer property. Someone got that \$2  
11      billion. The complaint only said, in a conclusory, non-  
12      factual, conjectural sense, that a portion of the  
13      redemptions to KEB were customer property. That allegation  
14      is non-factual, it is not made on personal knowledge, and is  
15      not entitled to credit.

16          The complaint also doesn't allege that the  
17      redemptions did not or could not have come entirely from the  
18      \$2 billion. He has not alleged, therefore, that it is more  
19      than a possibility that KEB receive customer property from  
20      the \$3 billion of BLMIS transfers.

21          But he also admits in the allegations I've  
22      referred to that it is equally possible that none of KEB's  
23      \$33 million of redemptions came from the \$3 million, but  
24      instead came from the \$2 billion.

25          So because he hasn't pled that, h e has to rely on

1 an inference in order to --

2 THE COURT: Wait. Explain the \$2 billion to me  
3 again. What does that --

4 MR. CIRILLO: I'm sorry, say that again?

5 THE COURT: What is that \$2 billion you just  
6 talked about?

7 MR. CIRILLO: Yes. If you add up all of the  
8 exhibits in all of the subsequent transfer complaints that  
9 are before Your Honor that allege subsequent transfers to  
10 subsequent transferees, they don't add up to \$3 billion;  
11 they add up to \$5 billion. And so the difference of what  
12 Fairfield paid to the subsequent transferees is obviously  
13 not customer property of BLMIS; it has to have come from  
14 someplace else.

15 Up to this point, the argument has been made that  
16 each complaint is different and the court judges on a  
17 12(b)(6) motion judges what is in the four corners of the  
18 complaint. But because they are allegations and judicial  
19 admissions in the same case and the Court can also take  
20 judicial notice of what they say, that is why we are  
21 entitled to argue that the Plaintiff has failed to tie the  
22 \$33 million of Fairfield's transfers to KEB to the \$3  
23 billion rather than the \$2 billion. And that because he  
24 hasn't pleaded them other than in the conclusory statement  
25 that a portion of them did, which has no factual support

1       whatsoever in the complaint, and that is required, he needs  
2       an inference to tie the \$33 million to the \$3 billion. And  
3       the inference is exactly what the Supreme Court's decisions  
4       in the Twombly and Iqbal cases address. That's exactly the  
5       issue of what permits an inference. And the court says  
6       simply that the presentation of two equal possibilities does  
7       not suffice to permit an inference. And that is what we  
8       have here; the possibility that the KEB transfers may have  
9       come from the \$3 billion and the possibility that they may  
10      have come from the \$2 billion. If they come from the \$3  
11      billion, there is a possible liability. If they come from  
12      the \$2 billion, there's no possible liability and the  
13      complaint has to push that over the line from possible to  
14      plausible.

15               Again, to emphasize how closely Twombly and Iqbal  
16      dictate the result, Twombly was a Sherman Act Section 1 case  
17      which require the plaintiffs as an essential element to  
18      allege that the defendants acted at a competitive contract  
19      combination or conspiracy, or to put it another way, they  
20      acted in concerted action.

21               The complaint alleged factually that the  
22      defendants reacted to the plaintiff's market conduct,  
23      finding it to be a competitive threat. The facts also  
24      allege that the defendants all reacted in an identical or  
25      very similar way to that. The plaintiff asked the court to

1 draw an inference that this uniform behavior was sufficient  
2 to allege the essential element of a concerted action.

3 The court, however, pointed out that the same fact  
4 that the defendants -- the same facts supported that the  
5 defendants' identical behavior was not a result of concerted  
6 action, but instead the independent business decisions of  
7 each of the defendants, not a conspiratorial one, but each  
8 one deciding to respond to the competitive threat in the  
9 same way.

10 And so as in our case, the alleged facts presented  
11 two equal possibilities, and the court said that isn't  
12 sufficient and it dismissed the complaint. That's where the  
13 Twombly phrase that we so often hear, "Nudging from what is  
14 possible or conceivable, but what is plausible" comes about.

15 The court held very clearly that an inference to  
16 survive a 12(b)(6) motion must be reasonable, and must be  
17 based on facts alleged in the complaint. It said that if it  
18 didn't, the allegation did not show entitlement to relief as  
19 both 12(b)(6) and Rule 882 require.

20 Iqbal, two years later, held that Twombly applies  
21 to all civil cases, including bankruptcy cases, by citing  
22 Federal Rule of Civil Procedure 1. And so in Iqbal, the  
23 plaintiff had brought a Bivens constitutional discrimination  
24 claim alleging that he was remanded to especially harsh jail  
25 confinement because he practiced Islam and because he was a

1 national of a Middle Eastern country. He claimed that he  
2 was partially confined for religion and nationality. And  
3 that in fact was possible on the factual allegations of the  
4 complaint.

5 But the court pointed out that the government had  
6 shown that Mr. Iqbal was confined or alleged that Mr. Iqbal  
7 was confined in strict conditions because he was or he may  
8 have been a combatant against the United States following  
9 the September 11th catastrophe.

10 The court found that without factual allegations,  
11 those two possibilities were equal and that without more  
12 factual content, as the court called it, the complaint  
13 failed to nudge the claim over the line from possible or  
14 conceivable to plausible.

15 So these require two things. The Supreme Court  
16 decisions require factual allegations to satisfy Rule  
17 8(a)(2) and they require a factual basis underlying a  
18 reasonable inference to satisfy 12(b)(6) if an inference is  
19 needed to allege an indispensable element of a claim. There  
20 are many cases that decisions that apply Twombly and Iqbal  
21 as indeed they must because it is our controlling precedent.

22 Coming back to why it's relevant here. The  
23 plaintiff alleges and admits that Fairfield made \$5 billion  
24 of transfers to subsequent transferees, but sent only \$3  
25 billion to its -- but BLMIS sent only \$3 billion to

1 Fairfield.

2 That is -- it is possible that the \$3 billion was  
3 the source of all or a portion of the KEB subsequent  
4 transfers, but it is equally possible that the \$2 billion  
5 was the source. This, because it leaves two equal  
6 possibilities that have no factual content to nudge them  
7 across the line, requires dismissal.

8 Now, to tie up a few loose ends, this pleading  
9 failure is not cured by the relevant pathways approach. The  
10 relevant pathways cases require a showing through which -- a  
11 showing by which the funds were transferred from BLMIS to in  
12 this case KEB. And that's in the Picard v. Charles Ellerin  
13 Revocable Trust case, WL 892514 \*3 (Bankr. S.D.N.Y. March  
14 14, 2012).

15 THE COURT: Let me ask you what you're adding to  
16 your papers, Mr. Cirillo. Please add to them.

17 MR. CIRILLO: Well, Your Honor, the papers come in  
18 in a sequence, and I am trying to tie them together in a way  
19 that makes sense and also to address some issues that may  
20 arise because there are prior decisions in subsequent  
21 transferee cases that make statements such as that the  
22 relevant pathways approaches is appropriate. And I am  
23 saying that in this case at least, that there is no showing  
24 of a relevant pathway because it doesn't show that the \$33  
25 million came from the \$3 billion.



1           Also, the vital statistics approach doesn't apply  
2           because that requires the who, when, and how much. But in  
3           this case, who sent the subsequent transfers and how much of  
4           them purportedly came from BLMIS are not alleged, whereas in  
5           other cases using those approaches there's always something  
6           more, like ledger entries approximate in time or identical  
7           in amount. I won't cite the cases because the citations are  
8           in the brief.

9           This is also not a complicated exercise --

10          THE COURT: This is not your personal  
11          jurisdiction. This is general.

12          MR. CIRILLO: No.

13          THE COURT: Okay.

14          MR. CIRILLO: This is the customer property issue.

15          THE COURT: Okay. All right.

16          MR. CIRILLO: I'm almost to the end of it. I just  
17          want to also, because of comments in other decisions, say  
18          that this is not an exercise that complicated matching of  
19          dates and amounts that you have seen. It only takes the  
20          factual allegations the plaintiff has made in his exhibits  
21          and adds them up arithmetically.

22          Therefore, lacking the critical element of  
23          customer property, I believe the complaint should be  
24          dismissed under Rules 8(a)(2) and 12(b)(6).

25          Quickly on the incorporation of the Fairfield

1 affiliates and insider complaint.

2 THE COURT: Let me just ask you a question though.  
3 And I do want to ask this question. I think what you just  
4 told me on that customer property argument, that sounded  
5 like trial to me. It doesn't sound like a motion to  
6 dismiss. So can you link that to a motion to dismiss for  
7 me, please?

8 MR. CIRILLO: Yes. Because the complaint does not  
9 allege an indispensable element of the cause of action,  
10 which is an allegation, a factual --

11 THE COURT: So you're saying that every one of  
12 these cases I should have dismissed, because everybody makes  
13 that same argument. But you said no, no, you're different.  
14 And how are you different?

15 MR. CIRILLO: Your Honor, I understand that Your  
16 Honor has made that ruling in other cases.

17 THE COURT: Many times.

18 MR. CIRILLO: And it that the facts in the  
19 complaint against KEB are different, firstly. And second, I  
20 do believe that Your Honor was wrong in all those cases.  
21 But that's not my --

22 THE COURT: But how? But how?

23 MR. CIRILLO: Because Your Honor may not have  
24 evaluated the absence of any factual allegation that ties  
25 the payments to the \$3 billion of BLMIS money rather than to

1 the equally-alleged, admitted -- judicially admitted \$2  
2 billion that Fairfield paid out that didn't come from BLMIS.  
3 That's \$2 billion of non-customer property being paid out.  
4 There is \$3 billion paid --

5 THE COURT: But Mr. Cirillo, Fairfield didn't have  
6 any other money.

7 MR. CIRILLO: That's not true, Your Honor. There  
8 is no allegation to that effect, firstly. At least in the  
9 KEB complaint. And secondly --

10 THE COURT: (indiscernible).

11 MR. CIRILLO: -- the plaintiff's own exhibits  
12 prove that it had \$2 billion of resources other than from  
13 BLMIS. I have not put in this because it is a pleading  
14 motion, and it does show that there is the absence, the lack  
15 of an indispensable element of the claim, but I haven't put  
16 in the fact that there are allegations and concessions that  
17 Fairfield was paying subsequent transfers out of newly-  
18 received subscription money rather than passing it to BLMIS  
19 and then having BLMIS pass it back to Fairfield for  
20 Fairfield to pass back. That money would not be as an  
21 example that -- the plaintiff does not negate in the  
22 pleadings in any fashion -- as an example of non-customer  
23 property that is equally possible to have been the source of  
24 the KEB payments.

25 That is why under the Supreme Court decisions it

1 is crystal clear that the plaintiff has made no factual  
2 allegations and in fact the only allegation is a bare bones  
3 conclusory statement that a portion of the payments to KEB  
4 came from BLMIS. That is not acceptable under any 12(b)(6)  
5 or 8(a)(2) pleadings standard. And that is why, Your Honor,  
6 I don't carry the water for any other defendant. And  
7 regrettably, I didn't get to argue as the first case, but I  
8 don't believe that KEB should be disadvantaged because I am  
9 briefing and arguing at this point rather than in the  
10 beginning of the sequence. And I believe these arguments  
11 are soundly supported by a controlling precedent, and  
12 therefore they should be considered very carefully and I  
13 believe accepted.

14 So may I continue to the incorporation briefly?

15 THE COURT: Please.

16 MR. CIRILLO: Okay. The court has held that the  
17 Fairfield insider complaint may properly be incorporated  
18 into the subsequent transfer complaints under Rule 10(c).

19 Forgive me for drinking, but I don't want to lose  
20 my voice.

21 And the Court cited In re In re Geiger, 446 B.R.  
22 670 (Bankr. E.D. Pa. 2010) for that point. And indeed,  
23 that's what Judge Fitzsimon did in that case. But then  
24 immediately in the next sentence after doing so, allowing  
25 the incorporation, she then dismissed the complaint under

1 Rule 8(a)(2) because the incorporation caused the complaint  
2 not to be a short and plain statement.

3 KEB also based its motion on both Rules 10(c) and  
4 8(a)(2). And so while the incorporation may be permissible,  
5 the short and plain statement is not accomplished, and  
6 therefore the case is dismissible for that separate reason.  
7 Courts have reached exactly the same position allowing  
8 incorporation under 10(c) and then dismissing because the  
9 incorporation made the complaint not a short and plain  
10 statement. One case, Davis v. Bifani, 2007 U.S. Dist. LEXIS  
11 3800, and American Casein Company v. Geiger (In re Geiger)  
12 446 B.R. 670 (E.D. Pa. 2010). I am not certain I have that  
13 court and date right, but I know it's the right case. It's  
14 cited correctly in the brief.

15 What am I asking for relief? Certainly I am not  
16 asking the Court to order the Plaintiff to type all of the  
17 allegations of the Fairfield complaint into the KEB  
18 complaint. That wouldn't accomplish anything. I certainly  
19 see that. But what the plaintiff does know, and only the  
20 plaintiff knows, is and can quickly, inexpensively, and  
21 without delaying the case put those paragraph numbers -- and  
22 if less than a full paragraph, the sentence into a list and  
23 we can put the list in the stipulated order. That is more  
24 efficient than a Rule 12(f) motion to strike the immaterial  
25 parts of the KEB complaint that are incorporated into it.

1           And I have to say that despite KEB's and my  
2           involvement in the Madoff cases for -- well, 14 years and  
3           KEB 11 years, I don't know and KEB doesn't know what the  
4           plaintiff has in mind. He has alleged hundreds of  
5           paragraphs of allegations. He has attached dozens of  
6           exhibits, none of which are directed at KEB. The KEB  
7           complaint is the blueprint for this case if it goes forward.  
8           And KEB and I are really entitled to know under Rule 8(a)(2)  
9           a short, plain statement of what it is we are defending.  
10          And we don't know that at this point.

11                 If Your Honor permits, I will move to the personal  
12           jurisdiction points, which --

13                 THE COURT: Please.

14                 MR. CIRILLO: -- are also important and also  
15           should result in a dismissal of the complaint, whereas  
16           obviously the incorporation point does not seek a dismissal;  
17           it seeks less relief of having them give me a list. All  
18           right.

19                 Personal jurisdiction. All of the plaintiff's  
20           allegations against -- involving KEB and personal  
21           jurisdiction are in paragraphs 5 and 6 of the complaint.  
22           Nine of the allegations in those paragraphs are purely  
23           conclusory, conjectural, and statements of law, and the law  
24           clearly bars them from consideration.

25                 For the Court's convenience -- and I put the exact

1 language of the allegation and the specific reason it cannot  
2 be considered on this motion as an appropriate probative  
3 allegation of jurisdiction in a chart at Pages 8 and 9 of  
4 KEB's reply memorandum, which is ECF Docket 143 filed on  
5 August 15 of this year.

6 Iqbal and Twombly that I have already discussed  
7 say the factual matter is required to survive Rule 8012  
8 motions, and it also says that a non-factual allegation, a  
9 conjectural, speculative, conclusory legal opinion type of  
10 allegation is not entitled to a presumption of truth.  
11 That's very important because we hear all the time that the  
12 plaintiffs are entitled to a presumption of the truths of  
13 their allegations. But as the Supreme Court said many times  
14 in those opinions, only if they are factual.

15 And the second thing is that they have to be  
16 factual or they may not serve as a basis for a reasonable  
17 inference of something else. And that again is in those  
18 cases. And I would also cite In re Lyondell Chemical  
19 Company, 543 B.R. 400, 411 (Bankr. S.D.N.Y. 2016), and  
20 DirecTV Latin America, LLC v. Park 610, LLC, 691 F.Supp. 2d  
21 405 (S.D.N.Y. 2010).

22 I am not going to discuss those conclusory  
23 allegations further. There are four assertions on which the  
24 plaintiff rests personal jurisdiction that are fact-based  
25 but that do not result in any or all of their cases,

1 individually or collectively, in jurisdiction.

2 First I will note that the plaintiff argued that  
3 factual allegations aren't necessary on a motion to dismiss  
4 for lack of jurisdiction. And that's just directly contrary  
5 to what Twombly and Iqbal say. Iqbal in fact said the  
6 pleadings that are no more than conclusions are not entitled  
7 to assumption of truth. Well-pleaded allegations are  
8 allowed the presumption of veracity and they are what are  
9 necessary in determining if they plausibly rise to an  
10 entitlement to relief. And in this case, plausible arise  
11 the inference is what one makes of these four allegations in  
12 terms of the personal jurisdiction contention; do they allow  
13 an inference of jurisdiction?

14 In fact, the Supreme Court expressly rejected the  
15 assertion that no facts are required in a footnote in which  
16 it dismissed the defense's actual statement of that  
17 position. It gave a long discussion of it. But it said in  
18 summary Rule 8(a) contemplates the statement of  
19 circumstances, occurrences, and events in support of the  
20 claim presented and does not authorize a pleader's bare  
21 (indiscernible) that he wants relief and is entitled to it.

22 And that was also the holding in a case Your Honor  
23 cited in many of the prior opinions, *Dorchester Financial*  
24 *Securities Ind v. Banco BRJ SA*, which is a Second Circuit  
25 2013 decision at 722 F.3d at pages 84-85 where the court



1 says, "Prior to discovery, a plaintiff challenged by a  
2 jurisdiction testing motion may defeat the motion by  
3 pleading good faith," and this is key, "legally sufficient  
4 allegations of jurisdiction," and that a 12(b)(2) motion  
5 "assumes the truth of the plaintiff's factual allegations  
6 for purposes of the motion and challenges their  
7 sufficiency."

8 So if there aren't factual allegations, and in  
9 this case the plaintiff is looking for an inference, there  
10 aren't factual allegations, there's no inference and no  
11 factual allegations.

12 All right. Let me also before hitting the four  
13 points put on the table exactly what minimum contact test  
14 is. We all know that it's purposeful availment. But what  
15 Hanson said is more than that. Chief Justice Warren said it  
16 is essential in each case that there be some act by which  
17 the defendant purposely avails itself of the privilege of  
18 conducting activities within the forum state. Thus -- from  
19 those activities conducted within the forum state, thus  
20 invoking the benefits and protections of its law. And  
21 that's cited to Justice Stone's opinion in International  
22 Shoe, which is by contrast on the facts one in which there  
23 were sufficient context with Florida -- I'm sorry,  
24 sufficient context, whereas in Hanson there were not.

25 The first of the four allegations that have some

1 factual foundation is that KEB received and read Fairfield's  
2 2004 private placement memorandum. As Your Honor knows,  
3 there was a whole series of Fairfield private placement  
4 memoranda and they didn't all say the same thing. In fact,  
5 after the SEC got on Madoff's tail and made him register as  
6 an investment advisor in 2006, there was a lot more in his  
7 private placement memorandums than there had been before.

8 And that's important because the plaintiff puts  
9 the 2004 memorandum before the court as Exhibit 1 to Mr.  
10 Fish's declaration. And what we find is that the exhibit  
11 itself, which necessarily overrides the complaint's  
12 mischaracterizations, shows that KEB could not have learned  
13 from that document that BLMIS was managing Fairfield's  
14 assets in New York and it could not have learned that  
15 Fairfield's redemption payments came from BLMIS to the  
16 extent they want -- well, came from BLMIS, period.

17 These are not only not stated in the one thing  
18 that's factually alleged, the PPM, and it is therefore not  
19 inferable from the PPM that KEB knew that the money it was  
20 sending and the money it was receiving to and from Fairfield  
21 was actually going to BLMIS and coming from BLMIS.

22 In fact, the only reference to BLMIS in the 2004  
23 PPM is that BLMIS was a sub-custodian of Fairfield asset,  
24 sub-custodian to Citco. It is a commonly-known industry  
25 term that shows a sub-custodian is an entity that holds on

1 to assets, but not an entity that invests or manages funds  
2 for another.

3 In fact, the 2014 PPM says 17 times that the split  
4 strike conversion strategy was being -- or that a company in  
5 Bermuda with a Bermuda address was Fairfield's investment  
6 manager and that it was overseeing Fairfield's strategy of  
7 investment called the split strike conversion strategy.

8 The plaintiff points out that the PPM explains  
9 that the split strike conversion strategy involved trading  
10 by Fairfield in U.S. securities. That's true, but it's  
11 irrelevant under both *Hanson v. Denckla* and *Walden V. Fiore*,  
12 which is at 571 U.S. 277, because there's no allegation that  
13 KEB performed any of that trading. And as the cases hold,  
14 personal jurisdiction over a foreign defendant depends on  
15 that foreign defendant's activity, not on the activity of  
16 third parties. That is a position the Supreme Court has  
17 stated both for commercial cases, as in *Hanson*, which  
18 actually addressed the point, and also in *Walden* for tort  
19 cases.

20 Therefore, while I do recognize that Judge  
21 Lifland's 2012 BLI decision embraced a view that knowledge  
22 by a defendant about what a third party would or wouldn't  
23 do, or would or might do sufficed for jurisdiction, that  
24 decision is in direct conflict with the Supreme Court's  
25 prior decision in *Hanson* and also was effectively overruled

1 by the Supreme Court's subsequent decision in 2014 by Walden  
2 where the court said the relationship must arise out of  
3 contacts that the defendant himself creates with the forum  
4 state. Due process limits on the adjudicative authority  
5 principally protect the liberty of the non-resident  
6 defendant, not the convenient of plaintiffs or third  
7 parties. We have consistently rejected attempts to satisfy  
8 the defendant-focused minimum contacts inquiry by  
9 demonstrating contacts between the plaintiff or third  
10 parties and the forum state. For that, the court cited  
11 Hanson and three other Supreme Court cases.

12 Therefore, the argument -- and I know it's a very  
13 initially attractive idea that tossing a seed and growing an  
14 orchard may have been what some defendants did, not KEB.  
15 But throwing -- knowing only and nothing more than that  
16 Fairfield was executing its split strike conversion strategy  
17 itself, or even if it knew it was by BLMIS, which it didn't,  
18 is not a basis to support jurisdiction over KEB.

19 Moving on. The second of the allegations that had  
20 some foundation in fact -- in the allegations is that the  
21 New York forum and New York governing law clauses and the  
22 subscription agreements between KEB and Fairfield is itself  
23 a relevant contact. That's not true.

24 If you can hear the dogs in the background, Your  
25 Honor, I have to admit, I got a memorandum saying this is

1 Bring your Dogs to Work Day. And so they are expressing  
2 their views of my argument.

3 THE COURT: Good or bad?

4 MR. CIRILLO: I'll have to consult with them  
5 later. But ultimately only your view counts. All right.

6 Why are the forum and governing law clauses not  
7 contacts with New York? Let's look at the forum provision.

8 The forum provision is not an exclusive  
9 jurisdiction provision. All it says is that Fairfield may  
10 drag KEB into New York court. It does not say that KEB  
11 can't sue in another court. It does not say that Fairfield  
12 Sentry can't sue in another court. And of course they are  
13 both foreign entities and other courts are available. In  
14 fact, Fairfield Sentry, Your Honor knows from the Migani  
15 case, did sue subsequent transferees in BVI and did not  
16 insist that that case proceed here.

17 So if anybody got the benefit or privilege of New  
18 York forum, it was not KEB; it was Fairfield. It did not  
19 reflect any conducting of activity by KEB in New York. If  
20 KEB had sued in New York, that would have been a contact.  
21 But it didn't. And so that is not a sufficient basis. The  
22 forum clause is not a sufficient basis to say that it was a  
23 contact by KEB in New York by which it was invoking benefits  
24 or privileges of New York.

25 The governing law provision is also not a relevant

1 contact. A governing law provision in a contract is only a  
2 rule for its interpretation and enforcement. It does not --  
3 citing it does not avail the person of a privilege or  
4 benefit of conducting an activity in New York. That's what  
5 Hanson Denckla, all the other cases require. The citing of  
6 a governing law provision is a frame of reference for  
7 litigation for the parties to negotiate and for arbitrators  
8 to interpret the contract.

9 New York does not -- it makes New York law, it  
10 doesn't own it. It's not something that it can prevent  
11 somebody from citing. And citing it does not subject  
12 someone to the jurisdiction of the court, of a New York  
13 court simply because it wants to refer to that as the frame  
14 of reference. It's not a privilege of conducting activities  
15 in New York. Any decisions that say or imply otherwise  
16 either are based on different facts than those are alleged  
17 or they fail to apply the controlling Supreme Court law and  
18 are therefore not viable precedents.

19 The third contact is that KEB filed proofs of  
20 claim in the BLMIS bankruptcy. And that's true. But in  
21 this case, it does not provide a basis for personal  
22 jurisdiction. When KEB filed those claims, the court did  
23 indeed have personal jurisdiction over KEB to adjudicate its  
24 claims against the -- KEB's claims against the BLMIS estate.  
25 However, several years before the plaintiff filed this

1 adversary proceeding, the plaintiff rejected KEB's claims in  
2 the bankruptcy. At that point, the court's jurisdiction  
3 over KEB based on the proofs of claims ended. The Court had  
4 no longer a basis for jurisdiction. And the filing of the  
5 adversary proceeding did not revive it.

6 The rationale for the rule that filing proofs of  
7 claim subjects the filer to the court's jurisdiction in an  
8 adversary proceeding is based specifically on the desire to  
9 have both the claims and the adversary proceeding resolved  
10 in a single case before a single judge. It is a judicial  
11 convenience rule, and that allows the court to net the  
12 outcomes of both parties prevail. However, that rationale  
13 does not and cannot apply if the bankruptcy claim was  
14 rejected before the adversary claim is filed. And as is  
15 known, the presence or absence of jurisdiction is determined  
16 at the moment the adversary proceeding is filed. And so at  
17 the time that this case against KEB was filed, there was not  
18 any proof of claim proceeding, proof of claim on file having  
19 already been rejected.

20 I did not find a case on all fours, but I did find  
21 relevant precedent, and that is cited and discussed and  
22 quoted at some length in the briefs and in the memoranda.  
23 Those cases look at the very analogous point of whether the  
24 filing of a proof of claim or the unfiled of a proof of  
25 claim permits the defendant in an adversary proceeding to

1 have a jury trial of the adversary claim or does not permit  
2 that. And it's based on whether equity jurisdiction exists  
3 in the court because of the filing of the proof of claim in  
4 the bk proceeding. And those cases are explored in great  
5 depth in the original brief we filed, which is Docket 138,  
6 filed on May 16th of this year, and Docket 145, filed on  
7 August 15.

8 They hold that a jury trial right under equity  
9 jurisdiction in an adversary proceeding is defeated by the  
10 pendency of a bankruptcy court filing, citing the  
11 conservation of resources theory. But they also say that if  
12 the claim is properly withdrawn or was concluded, the former  
13 claimant regarding his right or its right to the jury trial  
14 in the adversary proceeding because the court's equity  
15 jurisdiction had ended. And that's the situation that  
16 applies here in the related context, what I believe is a  
17 related context.

18 Therefore, the former proofs of claim filed by KEB  
19 are also not relevant contacts and do not confer a basis for  
20 jurisdiction under the minimum contact test.

21 The fourth and final factually-asserted alleged  
22 contact is that KEB made and received share payments through  
23 New York bank accounts. And I underscore the word through  
24 rather than to because the allegation acknowledges that the  
25 money was actually transferred, as the subscription



1 agreement signed by Fairfield and KEB provide, was actually  
2 transferred from KEB's account in Korea and to Fairfield's  
3 account with Citco in Ireland and then in revers, from  
4 Ireland to Korea. Those are the accounts designated in the  
5 subscription agreements.

6 Personal jurisdiction, as I believe Your Honor has  
7 said in some of the decisions, is determined by the law of  
8 New York. That's what the Second Circuit said in the Licci  
9 v. Lebanese Canadian Bank SAL, 732 F.3d 161 (2d Cir. 2013).  
10 And indeed, in that case the Second Circuit questions the  
11 New York Court of appeals in order to find out, ask it to  
12 explain what the law of New York is on this point of when  
13 bank accounts, use of bank accounts confer jurisdiction or a  
14 contact for conferring jurisdiction over a foreign  
15 plaintiff.

16 Because New York law governs, the New York Court  
17 of Appeals decisions are definitive. They can't be ignored  
18 or overridden by any other court. And there are three  
19 specific cases that define the law in this area. Amigo v.  
20 Marine Midland, 39 N.Y.2d 391, Licci v. Lebanese Canadian  
21 Bank, 20 N.Y.3d 327 (2012), and Rushaid v. Pictet, 28 N.Y.3d  
22 316 (2016). Another case cited, a recent appellate division  
23 case, First Department cited in the briefs confirmed that  
24 these three cases remain the law of New York.

25 So what do they hold? They hold that a non New

1 York person's use of a New York account is not a relevant  
2 contact for jurisdiction unless two conditions are met. One  
3 condition is that the account -- the use of the account must  
4 because integral to carrying out an illegal scheme.

5 The second condition is that the foreign user of  
6 the account must have been an active participant in the  
7 illegal scheme. Neither is alleged against KEB. And in  
8 fact, there is not even an allegation that KEB was aware of  
9 the Ponzi scheme, and it wasn't. All right.

10 In Licci, the illegal scheme was the financing of  
11 international terrorism. In Rushaid it was an international  
12 bribery and money laundering scheme. In both cases, the  
13 defendant, the foreign defendant resisting jurisdiction was  
14 an active participant, and in both cases the defendant  
15 resisting jurisdiction was using it as an integral part to  
16 carrying out the terrorism or bribery and money laundering  
17 schemes.

18 The New York Court of Appeals recognizes that  
19 trillions of dollars of ordinary commercial transactions,  
20 innocent transactions pass through New York banks every day  
21 on their way between foreign banks. The New York Court of  
22 Appeals indicated no intention -- it did not indicate any  
23 intention that its decisions would apply to ordinary  
24 commercial transactions which would or at least could have a  
25 serious chilling effect on that commerce if international

1 parties were routinely exposed to personal jurisdiction in  
2 New York, a place that many non-Americans would rather not  
3 litigate.

4 Amigo, the first of the three cases -- and that is  
5 the undergirding for the Licci and Rushaid cases, said the  
6 use of a New York bank for international transactions could  
7 not by itself constitute a relevant jurisdictional contact.  
8 Licci and Rushaid, which came later, made an exception for  
9 use of an account to accomplish wrongdoing.

10 The plaintiff argues in his opposition memorandum  
11 that, well, BLMIS' Ponzi scheme was illegal and therefore he  
12 has alleged facts bringing the case within the New York  
13 exception. That -- it is true that BLMIS' Ponzi scheme was  
14 illegal, but it does not confer jurisdiction over KEB. KEB  
15 is not alleged to have known of the Ponzi scheme, certainly  
16 not alleged to have been an active participant in the Ponzi  
17 scheme.

18 Furthermore, even assuming BLMIS and Fairfield  
19 were wrongdoers and their use of the New York banks was  
20 integral to their scheme, what they do cannot be attributed  
21 or imputed to KEB because of the decisions of the Supreme  
22 Court in Hanson and Walden. Only KEB's activities are  
23 relevant to the minimum contacts analysis.

24 Therefore, KEB's innocent use of New York banks in  
25 ordinary commercial payments flowing between an Irish and a

1 Korean bank is not relevant to jurisdiction over KEB as a  
2 matter of New York law established by New York courts. If  
3 other course have reached a different decision, it is of no  
4 moment because only New York's court of appeals can  
5 determine what New York's law is, and we know exactly what  
6 its law is from the Amigo Farms, Licci, and Rushaid cases.

7 Finally, I acknowledge the totality of the  
8 circumstances test for personal jurisdiction. However,  
9 parsing this between the generalized conclusory allegations,  
10 the nine allegations in Pages 8 and 9 of the reply brief and  
11 parsing these four contacts, not one of them is sufficient  
12 as a contact, a relevant contact for jurisdiction. And  
13 therefore, they can't add up to a totality of minimum  
14 contacts. Adding a bunch of zeroes still leaves you with a  
15 zero.

16 Even if the Court were inclined to find one of  
17 them or two of them sufficient, the cases defining what the  
18 totality of circumstances test is made it clear that it is a  
19 robust evaluation of whether in their totality there is a  
20 showing of doing business that takes advantage or privileges  
21 of New York. And those are not the case here.

22 And for that as my final citation, I will point  
23 the Court to the Hill decision, Hill v. HSBC Bank PLC, 207  
24 F.Supp. 3d 333 (S.D.N.Y. 2016), which was distinguished but  
25 not rejected in the BNP decision that's often mentioned

1 which says defendant's principal contrary authority, Hill v.  
2 HSBC Bank, et cetera, is distinguishable, and then goes on  
3 to distinguish that the BNC facts were strongly in favor of  
4 jurisdiction, but the acuity of facts in Hill were not.

5 The plaintiff says that, well, BNC said the Hill  
6 decision isn't relevant because it deals with Tremont.  
7 That's just not the case. It is relevant because of what  
8 the district court held and the BNC court did not in any  
9 fashion undermine the decision in Hill.

10 If I didn't cite BNP, it's SIPC v. Bernard L.  
11 Madoff Investment Securities LLC, 594 B.R. 167 (Bankr.  
12 S.D.N.Y. 2018)

13 With that, I will end. Appreciate Your Honor's  
14 great patience and hoping that I have persuaded you and the  
15 two dogs and ask Your Honor to dismiss this action against  
16 KEB under Rules 12(b)(6) and 8(a)(2).

17 THE COURT: Very good. Mr. Fish?

18 MR. FISH: Thank you, Your Honor. I will touch  
19 briefly on the customer property and Fairfield complaint  
20 incorporation by reference issues first.

21 As articulate as Mr. Cirillo was in making both of  
22 those arguments, they are really the same ones that have  
23 been made in all of the past subsequent transfer actions  
24 that have filed motions to dismiss, and they're the same  
25 arguments that have been rejected.

1           So for the customer property issue, the trustee  
2       has alleged the relevant pathways, including the transfers  
3       from BLMIS to Fairfield Sentry, and then the transfers from  
4       Fairfield Sentry to KEB. The Exhibit B to the complaint  
5       includes all of the transfers from BLMIS to Fairfield  
6       Sentry. And Exhibit C includes all 22 transfers from  
7       Fairfield Sentry to KEB. That's all that the trustee needs  
8       to do at this point. The trustee has alleged the relevant  
9       pathways, including identifying each transfer by date and  
10      amount from Fairfield Sentry. And as I said, includes all  
11      of the transfers from BLMIS to -- I'm sorry, from Fairfield  
12      Sentry to KEB.

13           And on their face, the subsequent transfers at  
14      issued looked to be transfers of customer property, as they  
15      all took place after Fairfield Sentry's receipt of initial  
16      transfers. And I'll just read one quote from your prior --  
17      Your Honor's prior decision --

18           THE COURT: Before you go there, give me a second  
19      to articulate a question.

20           MR. FISH: Sure.

21           THE COURT: Because if this is what I've heard --  
22      these transfers aren't to KEB; they're combined, correct?

23           MR. FISH: Well, Your Honor, Exhibit B --

24           THE COURT: You have 20 transfers and these are in  
25      Exhibit C. And is that all to KEB?

1 MR. FISH: Those are all to KEB, Your Honor. And  
2 in fact --

3 THE COURT: Explain it then to me.

4 MR. FISH: Okay. So Defendants in the case --  
5 there was a defendant who has been since dismissed. It was  
6 Korea Investment Trust Company. And Mr. Cirillo made an  
7 argument in his briefing that it's not clear who received  
8 the transfers because there were two separate defendants.  
9 But there's really only one defendant left since the  
10 dismissal of the management company. And it's clear -- an  
11 in fact, Mr. Cirillo didn't even argue that his clients,  
12 KEB, did not receive the transfers, because they did. All  
13 of the transfers --

14 THE COURT: So what you're saying is it was a  
15 management company that got dismissed.

16 MR. FISH: Correct. And they were dismissed  
17 because they didn't receive any transfers, or at least that  
18 under further investigation we didn't see any. They all  
19 went to Korean Exchange Bank.

20 THE COURT: Okay.

21 MR. FISH: So -- and I think Mr. Cirillo would  
22 acknowledge that his client received all the transfers. And  
23 so the argument really is that -- you know, he's making the  
24 same argument that every other defendant has made, that the  
25 trustee hasn't tied the transfers, the subsequent transfers

1 to the initial transfers. But I'll just -- in Multi  
2 Strategy and Banque Syz Your Honor wrote, "The calculation  
3 of Fairfield Sentry's customer property and what funds it  
4 used to make redemption payments are issues of fact better  
5 resolved at a later stage of litigation."

6 And I'll just leave the customer property issue  
7 with that and I will move on to incorporation by reference  
8 unless you have any additional questions.

9 THE COURT: How much did KEB get?

10 MR. FISH: Every transfer on Exhibit C -- and in  
11 fact, you know, we could delete defendants on that exhibit  
12 and just say KEB. They got all of those transfers, \$33  
13 million.

14 THE COURT: All right. Go ahead.

15 MR. FISH: Sure. So the arguments regarding the  
16 improper incorporation by reference of the Fairfield  
17 Complaint, Rule Eight's requirement of a short and plain  
18 statement have been repeatedly rejected by this Court. And  
19 for good reason. Because, number one, the district court  
20 has already found in consolidated proceedings that adopting  
21 the initial transfer complaint by reference is sufficient.  
22 This is the same action as the Fairfield action for purposes  
23 of the bankruptcy court. And there's no concern with  
24 confusing or inconvenient results, and there's no prejudice  
25 to KEB. I mean, what the trustee is really doing in that



1 one paragraph is alleging the avoidability of the initial  
2 transfers. And as I mentioned, this is the same issue that  
3 Your Honor has ruled on in probably a dozen cases thus far,  
4 and this case is no different.

5 So unless Your Honor has questions, I will move on  
6 to personal jurisdiction.

7 THE COURT: Please, move on.

8 MR. FISH: Thank you. So the totality of the  
9 circumstances here shows that jurisdiction is more than  
10 appropriate. All of Mr. Cirillo's arguments, all of KEB's  
11 arguments regarding the lack of jurisdiction, which are done  
12 very piecemeal, are abutted by the trustee's allegations and  
13 the arguments in the trustee's opposition.

14 First, KEB individually and as trustee purposely  
15 availed itself of the privilege of conducting activities in  
16 the U.S. and New York specifically. The trustee alleges  
17 that KEB invested in Fairfield Sentry to gain access to  
18 BLMIS, which is a plausible allegation when taken together  
19 with the allegation that 95 percent of Fairfield Sentry's  
20 assets were invested with BLMIS.

21 Now, Mr. Cirillo gave us a good recitation of  
22 Twombly and Iqbal and the standard of plausibility, but the  
23 allegation in the complaint in Paragraph 5, that defendants  
24 knowingly directed funds to be invested with New York-based  
25 BLMIS through Fairfield Sentry, that's a factual assertion

1 based on the allegation in Paragraph 2 that Fairfield Sentry  
2 was a BLMIS feeder fund and had virtually all of its assets  
3 invested in BLMIS.

4 It's therefore a reasonable inference to allege  
5 that the purpose of investing in Fairfield Sentry was to  
6 gain access to BLMIS. It begs the question why else would  
7 you invest in Fairfield Sentry if not to get to Madoff?  
8 There wouldn't be any other reason.

9 And in fact, the Second Circuit has even opined in  
10 the In re Picard case in 2019 when these investors chose to  
11 buy into feeder funds that placed all or substantially all  
12 of their assets with Madoff securities, they knew where  
13 their money was going. And Your Honor has also ruled in  
14 past subsequent transfer cases that this allegation is  
15 sufficient.

16 So the other issues that Mr. Cirillo has raised, I  
17 will go through them in order as well. He raised the issue  
18 of the 2004 private placement memorandum and why that  
19 private placement memorandum doesn't disclose that Madoff  
20 was the manager of the fund. And KEB focuses its papers on  
21 references to BLMIS and Madoff in the PPM, but the PPM does  
22 disclose that BLMIS holds 95 percent of the funds. And it  
23 also discusses the split strike strategy. And there's  
24 numerous references in that PPM, even if you didn't know it  
25 was Madoff, which is not -- that's not plausible in itself.

1 But even if you didn't, there's all sorts of references to  
2 New York. The strategy was centered around U.S. securities  
3 and buying S&P 100 stocks. Everything was in dollars, the  
4 minimum investment and the initial offering price.  
5 Fairfield Sentry maintained United States counsel. The PPM  
6 discussed trading risks discussed in U.S. government  
7 activities. It discussed Fairfield Sentry -- or I'm sorry,  
8 Fairfield Greenwich Group, which was essentially the manager  
9 of the fund, with its principal offices in New York. It  
10 discussed Fairfield Sentry's intermediary bank in New York,  
11 and it has a mention that legal matters in connection with  
12 the offering have been passed upon for Fairfield Sentry in  
13 the United States by counsel located in New York.

14 So the 2004 PPM, Mr. Cirillo tries to make a  
15 distinction with the 2006 PPM. But even if you didn't know  
16 that Madoff was running the show, you still had all sorts of  
17 disclosures here.

18 THE COURT: Let me interrupt you a minute. You're  
19 talking about that. Now, where is that located? What page  
20 is that on?

21 MR. FISH: Sure, Your Honor. The 95 percent of  
22 the assets under custody being held by BLMIS, that's  
23 attached to my declaration as Exhibit 1. And that's on Page  
24 15 of the private placement memorandum.

25 THE COURT: Okay. All right.

1 MR. FISH: Okay. The strategy discussing the S&P  
2 100 stocks and the split strike strategy, that's on Page 8.  
3 And I think there may be some on Page 9. The minimum  
4 investment and initial offering prices in U.S. dollars,  
5 that's on Pages 1 and 10, I believe. Let's see. The U.S.  
6 counsel, located in New York, it's located on VI. The  
7 trading risks discussing the U.S. government activities,  
8 that's on Page 16. The intermediary bank that's in the  
9 United States, that's on Page 13. Fairfield Greenwich Group  
10 FGG, maintaining its principal office in New York, that's on  
11 Page 6. And the legal matters in connection with the  
12 offering that had been passed upon in the United States by  
13 counsel located in New York, that's on Page 22.

14 THE COURT: Okay.

15 MR. FISH: So I think there are a number of  
16 disclosures. And again, why else would anyone invest in  
17 Fairfield Sentry other than to invest with Madoff if it's 95  
18 percent invested with Madoff? So the trustee's allegations  
19 are more than plausible under any standard.

20 And next I will move to the customer claims that  
21 Mr. Cirillo mentioned. But the trustee is not arguing that  
22 the customer claims automatically confer personal  
23 jurisdiction, but they do add to the totality of the  
24 circumstances here, and they show that the investment with  
25 Fairfield Sentry was a New York-based investment. And I

1 believe the customer claim that Mr. Cirillo submits with his  
2 declaration even says they are submitting a customer claim  
3 as an indirect investor with BLMIS. And also KEB's  
4 reasoning that even though they sought a benefit in the  
5 bankruptcy court in this jurisdiction by filing a customer  
6 claim, but there's no personal jurisdiction. It just seems  
7 like a -- contrary. So, again, the trustee is not alleging  
8 that these customer claims automatedly confer jurisdiction,  
9 but they are a piece of the puzzle.

10 And next I will move to the subscription  
11 agreements. And once again, the forum selection clause is  
12 one more circumstance showing the New York-centric nature of  
13 the investment, that KEB consented to being sued in New York  
14 and the application of New York law. And like the customer  
15 claimed, we're not arguing that this provision is binding or  
16 automatically confers jurisdiction. Rather, it's one more  
17 contact that shows that under the totality of the  
18 circumstances --

19 THE COURT: What exhibit is that? Tell me what  
20 exhibit that is.

21 MR. FISH: I'm sorry. The subscription  
22 agreements. They are attached to Mr. Cirillo's declaration  
23 as part of their customer claims. And the subscription  
24 agreement -- there's three of them, I believe. And the  
25 subscription agreement, there's three of them, I believe,

1 and the first one starts on -- they're all together, so I'll  
2 give you the ECF page number, if that's helpful to you. The  
3 first one is on Page 10 of 48 of, I believe it's Exhibit A.  
4 Let's see, the second one -- and all of these, I think Mr.  
5 Cirillo will agree that these subscription agreements are --  
6 say the same thing. The second one is on Page 32 of 48.  
7 This is -- and I'll give you -- the Document Number is 137-  
8 1. It's Exhibit A to Mr. Cirillo's declaration. And then,  
9 the third customer subscription agreement is Page -- I  
10 believe is 137-2, Exhibit B to the declaration. On Page 16  
11 of 40 is where it starts.

12 And I can -- you know, I can give you the specific  
13 pages of the -- well I can say that -- I can tell you that  
14 the forum clause, the consent to New York jurisdiction is on  
15 Page -- is Paragraph -- I believe it's Paragraph 19 of the  
16 subscription agreements.

17 THE COURT: Okay.

18 MR. FISH: So, we're not alleging that -- or we're  
19 not -- we're not arguing that the -- that these subscription  
20 agreements, that the forum selection clause automatically  
21 confer jurisdiction. But again, it's a piece of the puzzle,  
22 and it shows that Korea Exchange Bank had multiple contacts  
23 with the forum and purposely availed itself of the benefits  
24 and the privileges of doing business in the United States,  
25 specifically in New York.

1 And, you know, these subscription agreements also  
2 include the New York bank accounts as well. Where to send -  
3 - and in fact, this is where to send the redemptions. And  
4 we know that they did receive the redemptions. And so, on  
5 Pages -- Page 31 of 48 on Document 137-1, that's Exhibit A,  
6 and then there's another one on Page 19 -- I'm sorry, 20 of  
7 48 on Exhibit A. And then, Exhibit B, Document 137-2,  
8 there's another one. It's less easy to read, but it does  
9 say Deutsche Bank Trust Americas New York on all of them.  
10 This is Page 26 of 40 on 137-2. All of these subscription  
11 agreements include a New York bank to receive redemptions.

12 Now, this document doesn't say that this is a  
13 passthrough. It says that's where the redemptions are to be  
14 sent. And that leads me to the bank account issue, that KEB  
15 maintained a bank account in New York at Deutsche Bank  
16 Americas, and that's where they received all of the  
17 transfers, I believe.

18 THE COURT: Do you happen to have the last four  
19 numbers on that account, by any chance?

20 MR. FISH: Let's see, it's --

21 THE COURT: Not all of it. I purposely don't want  
22 all of them.

23 MR. FISH: Yeah, 1033 I think is the account  
24 number.

25 THE COURT: The last four digits?

1 MR. FISH: Right.

2 THE COURT: Okay.

3 MR. FISH: And let me -- I just want to make sure  
4 that it's the same account. That's at least what it says on  
5 the -- on the subscription agreement. And I've also, Your  
6 Honor, I've attached to my declaration some documents as  
7 Exhibit 2 and 3, showing the requests for redemption. And  
8 they are to go to the same Deutsche Bank Trust Company  
9 Americas account. And I believe we've redacted the account  
10 information from those.

11 THE COURT: Okay. Make sure you do. All right.

12 MR. FISH: But the documents do include -- so,  
13 it's clear that KEB requested redemptions and received  
14 redemptions in a New York bank account. And this shows --  
15 these documents show that the use of this account was  
16 voluntary and there was an intent to use this account for  
17 redemptions. So, that's just to say that the transfers were  
18 -- they purposely went through the New York bank account.

19 This is not a situation, as my able adversary has  
20 argued, where the -- these bank accounts had nothing to do  
21 with the transactions. In fact, I mean, the Trustee is  
22 alleging that the transfers at issue in this case, the very  
23 transfers, the very subsequent transfers that the Trustee is  
24 trying to recover, went through these New York bank  
25 accounts. This isn't like some of the cases that Mr.



1 Cirillo pointed to, where a defendant was accused of  
2 wrongdoing or terrorism, but this is a case where the  
3 correspondent account was used for the purpose, really, of  
4 which the Trustee is suing.

5 And there's also a case on point, or more on point  
6 than the cases KEB cites, that I just want to bring to Your  
7 Honor's attention. We cite it in our opposition brief, but  
8 it was just decided on May 22, and that's in the Arcapita  
9 case. And the District Court in that case affirmed personal  
10 jurisdiction where the defendant in the commercial  
11 transaction "designated a correspondent account in New York  
12 to receive the fund transfers." And even though the debtor  
13 chose to use US dollars to effectuate the investment, the  
14 Court said that the defendant "could have avoided the United  
15 States entirely by routing placements through correspondent  
16 accounts anywhere in the world." And this is Bahrain  
17 Islamic Bank versus Arcapita Bank. It's 640 B.R. 604.

18 And similarly, KEB voluntarily used the Deutsche  
19 Bank New York account to do business with Fairfield Sentry,  
20 which by the way also used a New York account, which is  
21 disclosed in the private placement memorandum. And nothing  
22 was forcing KEB to do business with Fairfield Sentry.  
23 Nothing was forcing them to use a New York bank account.  
24 They voluntarily entered into these subscription agreements  
25 and took these transfers and used a New York bank account to

1 do it. So, even though KEB says that they weren't doing  
2 anything illegal or they may not have known of the fraud,  
3 these correspondent accounts were part of the scheme, and  
4 they received subsequent transfers of customer property.

5 So the -- Your Honor, the totality of the  
6 circumstances shows that KEB purposely availed itself of the  
7 privilege of conducting activities in the US, and New York  
8 specifically. Second, the Trustee's claims arise out of or  
9 relate to KEB's conduct in the forum. I don't think that's  
10 a dispute. And third, jurisdiction is reasonable under the  
11 circumstances, for the same reasons Your Honor has  
12 articulated in other subsequent transfer motions that have  
13 come before you. And the arguments that KEB makes in its  
14 motion are similar to ones that have been rejected in more  
15 than a dozen other motions so far. There's no reason to  
16 stray from these prior decisions, either factually or  
17 legally, and KEB's arguments should similarly be rejected.

18 Thank you. Unless you have any questions, I'll  
19 rest, Your Honor.

20 THE COURT: I think I had a few. Mr. Cirillo,  
21 any --

22 MR. CIRILLO: Well, yes, Your Honor, I do have a  
23 couple --

24 THE COURT: Bullet-point rebuttals, please.

25 MR. CIRILLO: I'm sorry, say again?

1 THE COURT: Bullet-point rebuttals, please.

2 MR. CIRILLO: Yes, of course. The purposely  
3 availed point that my -- that Mr. Fish raised, that goes to  
4 the issue that you have to know that BLMIS was behind  
5 Fairfield, and there's no basis for that allegation -- for  
6 that assertion, other than Mr. Fish's statement that why  
7 else would one invest in Fairfield, except to get to  
8 Plaintiffs.

9 Mr. Fish ranged far from the allegations in the  
10 complaint, and I will only add this, that as Mr. Fish knows,  
11 we have explained to him that KEB was only a -- only  
12 executed the transactions that the manager, now dismissed,  
13 ordered. It had no obligation to know anything at all about  
14 the investments, this or any of the other investments, as  
15 Trustee. So, it is pure conclusory speculation, contrary to  
16 fact, that KEB knew. And if it didn't know, and there's no  
17 allegation other than conclusory allegation that it did, the  
18 knowledge is not sufficient. As I explained, my view is  
19 that the BLI decision, whatever was in 2012, was effectively  
20 overruled in 2014.

21 Mr. Fish refers to us knowing that KEB knew  
22 that -- from the PPM that BLMIS held 95 percent of the  
23 funds. As I explained, being a custodian and holding funds  
24 -- which many, many broker dealers do for other broker  
25 dealers, and we know that Madoff or BLMIS was a registered

1 broker dealer -- has nothing at all to do with whether it  
2 knew that 95 percent of the funds were being invested in  
3 BLMIS on a long-term basis. It only tells them -- and  
4 certainly does not tell them what Mr. Fish wants to draw  
5 from it that KEB knew that BLMIS was behind Fairfield  
6 Sentry. There is no imputation.

7 All of the many things that Mr. Fish listed as New  
8 York-centric events can't be imputed to KEB under Walden.  
9 It is not part of the totality of circumstances; it is  
10 irrelevant. The fact that these accounts were passthroughs  
11 in fact is alleged in Paragraph 5 of the complaint, which as  
12 I said earlier, talks about -- it says wired funds to  
13 Fairfield Sentry through a bank in New York and received  
14 funds through its own bank account in New York. Going back  
15 to the basic documents that Mr. Fish has identified, Your  
16 Honor, the subscription agreements, that's how you get money  
17 from the account, the specified account in Korea to the  
18 specified account in Ireland, and get it from the specified  
19 account in Ireland to the specified account in New York.  
20 Innocent, completely commercial transactions, which the  
21 three New York Court of Appeals decisions clearly state will  
22 not support jurisdiction if they are not by a participant in  
23 an illegal scheme.

24 The reference to things that the customer claims  
25 filed KEB say, like being an indirect investor in BLMIS,

1 can't be things that they -- well, they are not things --  
2 and there's no allegation they are things that BLMIS knew --  
3 that KEB knew when it was investing and redeeming. In fact,  
4 those customer claims were filed long after, months after  
5 the world knew. From December 8, 2008, onward, we all  
6 learned that BLMIS was behind Fairfield. We didn't know it  
7 until then, but in trying to participate as an indirect  
8 investor, that it learned it was an indirect investor on  
9 behalf of its trusts. Of course it alleged what it would  
10 need. That doesn't have any evidentiary probity.

11 The broader issue is that you can't take a bunch  
12 of zeroes and add up to more. There is no puzzle to be  
13 pieced together. These are not pieces. And the principal  
14 argument that I heard several times is that these arguments  
15 have already been made and rejected. Your Honor, and I  
16 discussed that at one point during my presentation, my  
17 argument, and yes, I recognize that there have been  
18 decisions that have made and -- on some of these arguments  
19 that have been rejected. However, we have seen over and  
20 over again that courts can change their minds, and do change  
21 their minds. And we know that no progress is made in the  
22 law unless it is viewed from new perspectives.

23 The perspectives that I have presented to Your  
24 Honor are not perspectives that have been presented  
25 previously. I have been assiduous in keeping track of the

1 filings and the arguments, and I think that whether or not a  
2 prior decision has been made, it needs to be reviewed on the  
3 facts of this complaint, on the cases that are cited in  
4 these briefs, and on the actual content of the documents  
5 that have been put before the Court in this and other cases  
6 that are part of the same case.

7 That's what I have to say, and I thank you for  
8 listening.

9 THE COURT: Very good, Mr. Cirillo. Mr. Fish, do  
10 you have anything you wish to add?

11 MR. FISH: Your Honor, I'll just add a few things  
12 here. It wasn't just me who said, why else would anyone  
13 invest in Fairfield Sentry, if not for BLMIS, but the Second  
14 Circuit said that in the in re: Picard case, 917 F.3d 85, on  
15 Page 105 of that opinion. As I said, when these investors  
16 chose to buy into feeder funds that placed all, or  
17 substantially all, of their assets with Madoff Securities,  
18 they knew where their money was going.

19 THE COURT: Okay. We've heard you.

20 MR. FISH: And Mr. Cirillo makes a -- made a  
21 comment about KEB maybe not necessarily knowing about Madoff  
22 and that they were getting instructions. But that's, you  
23 know, that's an issue for discovery, because you know, KEB  
24 was investing on behalf of trusts. And under New York law,  
25 the trustee can't sue the trusts, they can only sue the

1 trustee. That's why they sued KEB individually and as the  
2 trustee of these three trusts.

3 And the subscription agreements specifically state  
4 that if the subscriber is signing as a trustee or agent or  
5 nominee or someone else, it still "agrees that the  
6 representations and agreements herein are made by a  
7 subscriber with respect to itself and the beneficial  
8 shareholder." And that's the subscription agreements at  
9 Paragraph 27. And KEB is very careful about not saying what  
10 the intent of the trusts were, and we can only surmise as to  
11 why.

12 THE COURT: Very good. We're not surmising today.

13 MR. FISH: Right. But I think it's -- the Trustee  
14 has alleged sufficient facts to confer personal jurisdiction  
15 in this court.

16 And also, I also wanted to just go back to  
17 something that Mr. Cirillo mentioned about the Trustee not  
18 needing to allege facts. That's not what we argued in our  
19 opposition. In fact, we were citing a couple of Your  
20 Honor's opinions in Bank Lombard Odier and Banca Carige,  
21 where I think the quote was, "At the pre-discovery stage,  
22 the allegations need not be factually supported." In other  
23 words, this is not a summary judgment motion. This is a  
24 motion to dismiss, and the Trustee has alleged sufficient  
25 facts, both under Rule 12(b)(2) and 12(b)(6).

1 And with that, Your Honor, I'll rest.

2 THE COURT: Thank you.

3 MR. CIRILLO: Your Honor, two words, or two  
4 briefly --

5 THE COURT: You had your rebuttal, so quick. That  
6 was his --

7 MR. CIRILLO: Well, I'm the movant, so he had his  
8 -- this is our answer. First, Your Honor didn't  
9 misunderstand Dorchester. Dorchester says you need facts  
10 and factual allegations. It's the fact allegations that are  
11 missing here, and that's what Dorchester said, and that's  
12 what Your Honor cited in the part that Mr. Fish just quoted.

13 Secondly, why else would they invest? Well, the  
14 Second Circuit didn't purport to know why KEB acted, and  
15 Mr. Fish doesn't know why KEB acted. I mentioned the fact  
16 it was a Trustee taking orders simply because he had  
17 continually referenced the "why else would they invest"?  
18 There are lots of reasons why these trusts would be there,  
19 and the Court can't speculate about --

20 THE COURT: You've both been heard. You have both  
21 been heard.

22 MR. CIRILLO: Good. I'm done; thank you.

23 THE COURT: 11-02573, Trustee Picard versus  
24 Sumitomo Trust and Banking Company, state your name and  
25 affiliation.



1 MR. LANDSMAN: Good afternoon, Your Honor. My  
2 name is Zeb Landsman, and I represent Sumitomo, and I'm with  
3 the law firm of Becker, Glynn, Muffly, Chassin & Hosinski.

4 MR. SONG: And good afternoon, Your Honor, Brian  
5 Song, Baker Hostetler, on behalf of the Trustee.

6 THE COURT: Very good. I believe this is your  
7 motion to dismiss, Mr. Landsman.

8 MR. LANDSMAN: It is. Thank you, Your Honor. I  
9 am going to be quick, less than 10 minutes, hopefully five,  
10 if I can.

11 THE COURT: You're very kind to a judge that's  
12 been sitting all day.

13 MR. LANDSMAN: You're welcome. I'm going to limit  
14 my argument to just one of the points that I raised in the  
15 motion, and that's Sumitomo's 8(a) argument.

16 Rule 8(a) is simple. It requires plaintiffs to  
17 include a short, plain statement showing that the pleader is  
18 entitled to relief. Here, in this case, the Trustee needs  
19 to allege two things: one, that there was an initial  
20 transfer from BLMIS to Sentry that is avoidable, and two,  
21 that the Sentry -- that Sentry subsequently transferred  
22 those funds to Sumitomo.

23 The Trustee certainly gave us fair notice of the  
24 second drop. He clearly identified the subsequent transfer.  
25 In Paragraph 40 in Exhibit D, he clearly alleges, simply and

1 precisely, that \$54,253,642 was transferred on October 16,  
2 2007, from Sentry to Sumitomo. He did that perfectly. The  
3 problem, Your Honor, is with the first prong.

4 Rather than identifying an initial transfer that  
5 is avoidable, he simply attached a 77-page list of thousands  
6 of transfers, totaling billions of dollars, spanning years.  
7 That's his Exhibit C, and if you look on Page 6 of our  
8 brief, I have a sample of that. It's as if a plaintiff,  
9 Your Honor, brought a breach of contract claim and alleged  
10 that the defendant failed to perform on a particular day.  
11 But then, rather than identifying the contract that was  
12 breached, he listed hundreds of contracts and simply said,  
13 you breached one of those. Figure it out. Or, if I were  
14 accused of running a red light on a particular day that's  
15 identified, and then the complaint listed every intersection  
16 in the city, I wouldn't be able to answer the complaint. I  
17 wouldn't be able to prepare for trial.

18 In the red light example, I'd have to take  
19 discovery on every traffic signal, seek thousands of records  
20 from the cameras, seek out potential witnesses to prove the  
21 plaintiff may have stated a claim, but it's also made it  
22 impossible to prepare for trial. Sumitomo is in that  
23 position. The Trustee will have to prove that there is an  
24 initial transfer that is avoidable. We have the right to  
25 seek discovery about that initial transfer to determine

1 whether it really happened. He's given maybe documents, but  
2 we get discovery on whether it really happened and whether  
3 it is avoidable.

4 We have the right to craft a defense based on  
5 which initial transfer the Trustee plans to use at trial,  
6 and it's not too soon to require the Trustee to identify  
7 one. We need to answer the complaint and start discovery  
8 now. We need to gather evidence about the alleged initial  
9 transfer now. But we can't.

10 Without more specifics from the Trustee, we'll  
11 have to seek discovery about those hundreds of transactions  
12 listed in Exhibit C. We'll have to show up at trial without  
13 knowing which transaction constituted the alleged initial  
14 one. We'll have to wait for trial for him to tell us  
15 whether the initial transfer was within the two-year  
16 lookback period or not. We don't know. And that's because  
17 our subsequent transfer was within the two-year lookback  
18 period, but he hasn't told us if the initial transfer was,  
19 and that will affect our defense.

20 And it's particularly unfair here to keep Sumitomo  
21 in the dark, because Sumitomo was a stranger to that initial  
22 transfer. It has no direct knowledge of it. Unlike the  
23 Chase case that they mentioned, all of that information is  
24 with the Trustee and the records he has. We don't know  
25 anything about the initial transfers because we weren't a

1 party. It was between BLMIS, in whose shoes the Trustee  
2 stands, and Sentry. And the Trustee has had access to that  
3 information for years, yet he still refuses to identify the  
4 basis for his claim that there was an initial transfer  
5 that's avoidable.

6 The Trustee needs to comply with Rule 8(a), and  
7 Sumitomo cannot answer the complaint or prepare for trial  
8 unless he does. And that's why we respectfully request that  
9 you dismiss the complaint and perhaps give him leave to  
10 amend it, but dismiss the (indiscernible) so we can properly  
11 answer it.

12 THE COURT: Thank you, Mr. Landsman. Mr. Song?

13 MR. SONG: Thank you, Your Honor. I will address  
14 it briefly as well, as it has been a long day for all of us.

15 The Defendant's argument here is based on the  
16 faulty premise that the Trustee is required, here at the  
17 pleading stage, to identify and specify the exact initial  
18 transfer to Fairfield Sentry, from which the subsequent  
19 transfer to Sumitomo flowed. Defendant would thus create  
20 some entirely new pleading burden, wherein the Trustee would  
21 be required to essentially do a dollar-for-dollar tracing  
22 analysis at the outset of the case.

23 This Court has already held that to plead a  
24 subsequent transfer claim, the Trustee must allege facts  
25 that support an inference that the funds at issue originated

1 with the Debtor, which we have done that. No tracing  
2 analysis is required, and the pleading burden is not so  
3 onerous as to require a dollar-for-dollar accounting of the  
4 exact funds at issue. That's because money is fungible,  
5 Your Honor, and as, you know, Defendant here is claiming  
6 that they won't know until trial, I think that's also a  
7 misapprehension of what the burdens are here.

8 We are about to get into discovery, and I agree  
9 with my -- with my adversary here that it is important to  
10 get into these issues. But that is precisely what discovery  
11 is for. And the Trustee's experts, once they've had the  
12 opportunity to participate through discovery, will issue an  
13 expert report, which will show the tracing and the flow of  
14 funds from the initial -- from BLMIS to Fairfield Sentry and  
15 to Sumitomo. They will not be surprised at trial. We will  
16 have this throughout the discovery process.

17 This Court has already discussed and knows very  
18 well that the Trustee only needs to plead the necessary  
19 vital statistics, and we have done that, and that that is  
20 all that is required, and that's what we have done.

21 Thanks, Your Honor.

22 THE COURT: Okay. Mr. Landsman or Mr. Song,  
23 anything else you wish to add?

24 MR. LANDSMAN: Yes, just two quick replies to  
25 that.

1 THE COURT: Okay.

2 MR. LANDSMAN: He doesn't need any discovery from  
3 us because we don't have any discovery on that question  
4 about which is the initial transfer. We know nothing about  
5 it. We got the subsequent transfer; we'll give him  
6 discovery about that. But to identify the basis for his  
7 entire claim, he needs no discovery from us.

8 So what he's saying is, we now need to go take  
9 discovery on those hundreds of transfers and take  
10 depositions on those hundreds of transfers, because he can't  
11 even narrow it down to a smaller set. We're not asking him  
12 for tracing. We're asking, just tell us what the initial  
13 transfer was.

14 THE COURT: Okay. Understand. Anything else?

15 I thank everyone for their patience and your  
16 kindness all day long. I hope that you have a lovely  
17 evening. And you will receive a written opinion.

18 MR. LANDSMAN: Thank you, Your Honor.

19 MR. SONG: Thank you, Your Honor.

20 THE COURT: Thank you.

21

22

23 (Whereupon these proceedings were concluded at

24 3:54 PM)

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: September 19, 2022

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